

<sup>1</sup> Mr. Singh's first name was identified by his attorney's letters as "Bickram" (Exhibits 42, 50 and 72). At the hearing, the transcriber reports his first name as "Ricky" (Tr. 4) and "Sadvir" (Tr. 188).

## I. STATEMENT OF THE CASE

Petition No. S-2699, filed on March 8, 2007, seeks a Special Exception, pursuant to §59-G-2.06 of the Zoning Ordinance, to allow an automobile filling station, including a car wash and a convenience store as accessory uses, on a site currently occupied by an abandoned filling station. Petitioner ExxonMobil Corporation (Exxon) owns the property,<sup>2</sup> which consists of three parcels in the C-1 Zone (Tax Account Numbers 05-03297561, 05-00269225, 05-00249193):

- 1) Lot N-890, located at 16201 New Hampshire Avenue, Silver Spring, MD 20905
- 2) Parcel P-918, located at 1201 Spencerville Road (Route 198), Silver Spring, MD 20905
- 3) Parcel P-864, located on Spencerville Road, Silver Spring, MD 20905

The 1.25-acre site is located in the northeast corner of the intersection of New Hampshire Avenue (MD 650) and Spencerville Road (MD 198). It is approximately two miles south of Ashton and one mile north of Cloverly Town Center.

The matter was first scheduled for a hearing on July 20, 2007, but was postponed a number of times at Petitioner's request. Technical Staff of the Maryland-National Capital Park and Planning Commission initially recommended denial of the special exception because the building layout did not meet required setback provisions and the site design presented traffic safety issues due to a proposed exit onto New Hampshire Avenue. Exhibit 29. At the Montgomery County Planning Board meeting of November 29, 2007, ExxonMobil requested a deferral of the case to address the concerns raised by Technical Staff and the Planning Board. That deferral was recommended by the Planning Board's letter of November 30, 2007 (Exhibit 36), and on December 5, 2007, a notice was issued to postpone the hearing in this case till February 26, 2008 (Exhibit 35).

On January 3, 2008, Petitioner submitted new site plans, and on January 14, 2008, submitted an amended statement of operations (Exhibit 40(a)). These and other revisions of the

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<sup>2</sup> A portion of one lot (N 839, a predecessor to Lot N 890) is leased by Exxon from Coppersmith Children's Trust. See Exhibit 9.

plans were duly noticed as amendments to the petition (Exhibits 28, 39, 41, 44 and 48). Based on the revised plans, Technical Staff issued a new report on January 14, 2008, recommending approval of the petition, with conditions (Exhibit 49).<sup>3</sup> On February 14, 2008, the Planning Board voted unanimously to recommend approval of the special exception, subject to the conditions outlined by Technical Staff in its report. Exhibit 52.

Letters of opposition were received from Brian D. Kotzker, Esq. for Bikram Singh (Exhibits 42 and 50); Dr. Reginald L. Amory (Exhibit 33 and 51) on behalf of the Hampshire Greens Homeowners Association; Darnell k. Daisey (Exhibit 32); Jesse Brande (Exhibit 14); Robert E. and Carolyn C. Berngantt (Exhibit 17); and Sravant Lavu (Exhibit 18). A Petition with 35 signatures was also filed in opposition (Exhibit 31).

A public hearing was convened as scheduled on February 26, 2008. Testimony was presented by Petitioner and by four Opposition witnesses – confronting neighbors, Michael Aladesuru and Bikram Singh, Dr. Reginald L. Amory, who testified on behalf of the Hampshire Greens Homeowners Association, and Steven Szot, who lives in the nearby Hampshire Greens community. The record was held open until March 18, 2008, to give Petitioner's counsel the opportunity to file revised plans and materials discussed at the hearing, and to give interested parties time for comment. Petitioner did so on March 7, 2008 (Exhibits 68(a) – (f)). Mr. Aladesuru responded on March 17, 2008 (Exhibit 69) regarding the issue of screening, and Petitioner replied to Mr. Aladesuru's letter on March 17, 2008 (Exhibit 71).

Subsequently, the Hearing Examiner requested that Martin Klauber, the People's Counsel, meet with the parties to see if differences on the issue of screening for the confronting property owners could be resolved. On April 4, 2008, at the request of Brian D. Kotzker, Esquire, on behalf of Mr. Singh, and with Petitioner's consent, the Hearing Examiner reopened the record to receive

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<sup>3</sup> The Technical Staff Report is frequently quoted and paraphrased herein.

modified plans and clarifications as to the lots constituting the subject site. On April 10, 2008, the Hearing Examiner issued an order requiring Petitioner to supplement the record with data relating to the compatibility of the proposed convenience store with its rural/residential surroundings.

Exhibit 75. On April 17, 2008, the Hearing Examiner issued an order informing interested parties of his intent to consider additional resources regarding trip generation from the proposed use, and giving the parties an opportunity for comment. Exhibit 78.

Revised plans and additional materials were received on April 21, 2008 (Exhibit 80) and April 28, 2008 (Exhibits 82 and 83); however, the Hearing Examiner remained concerned about three issues: the impact on the confronting neighbors of traffic volume on Old Spencerville Road; the parking areas specified on the site plan; and the compliance of the driveways with the Zoning Ordinance. He therefore issued orders on April 30, 2008 and May 13, 2008 (Exhibits 84 and 87) giving all parties the opportunity to directly address these concerns. Mr. Aladesuru responded on May 1, 2008 (Ex. 85), arguing that a “wall-fence” is needed to shield his property. After receiving an extension of time, Petitioner responded to the Hearing Examiner’s concerns on June 4, 2008 (Ex. 90), with additional materials and a revised site plan (Ex. 90(j)). Technical Staff responded on the same day (Exhibit 91). On June 16, 2008, after a ten-day comment period, the record closed again.

Although the Opposition in this case raised some legitimate concerns, the preponderance of the evidence supports the granting of the requested special exception, in a modified form and conditioned in a manner that will reduce adverse effects on the neighbors. This site is in a commercial zone (though surrounded by residential zones); it is located at the intersection of two major roads; and it has already been the site of an automobile filling station. While the proposed use would be more intense than the original station at that location, the intensification is not so dramatic that it can’t be ameliorated by requiring appropriate screening and other conditions, including a wooden fence to be located on the confronting property owners’ land, if they are agreeable.

## II. FACTUAL BACKGROUND AND ANALYSIS

### A. The Subject Property

The subject property is a 1.25 acre, trapezoidal tract of land bordered by three roads, New Hampshire Avenue (MD 650) on the west, Spencerville Road (MD 198) on the south and Old Spencerville Road on the northeast. The subject property is approximately 1.25 acres in size and is in the C-1 Zone. According to Technical Staff, the property has approximately 300 feet of street frontage along New Hampshire Avenue and nearly 400 feet of frontage along Old Spencerville Road. A small, abandoned automobile filling station occupies the northern portion of the site.<sup>4</sup>

The description of the parcels constituting the subject site requires some explanation. Petitioner lists the address of the site as 16201 New Hampshire Avenue, Silver Spring, Maryland, and indicates that it is composed of three parcels (Attachment to Application, Exhibit 1(a)):

- 1) Lot N-890, located at 16201 New Hampshire Avenue, Silver Spring, MD 20905
- 2) Parcel P-918, located at 1201 Spencerville Road (Route 198), Silver Spring, MD 20905
- 3) Parcel P-864, located on Spencerville Road, Silver Spring, MD 20905

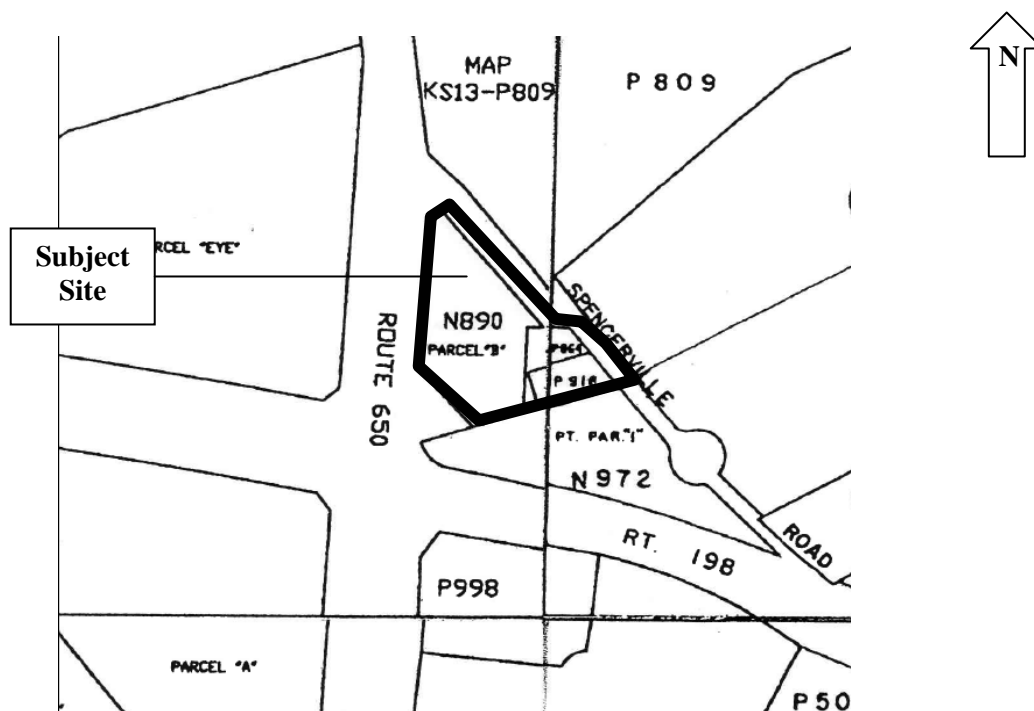
Examination of the record by the Hearing Examiner revealed that the Zoning Maps filed by Petitioners (Exhibits 11 and 64) showed Parcels N-839, P-893 and P-918 on the subject site, not Parcels N-890 and P-864. Also, Petitioner filed a lease document in the case (Exhibit 9) indicating that Exxon is leasing Parcel N-839 (or a part of it) from Coppersmith Children's Trust, but parcel N-839 is not among the parcels listed by Petitioner as constituting the site. To further complicate this matter, review by the Hearing Examiner of Maryland's on-line Real Estate Tax records (SDAT) revealed that tax maps associated with Parcels 918 and 864 do not correspond with the location of the subject.

At the request of the Hearing Examiner, Petitioner's attorney clarified the record with a letter and attachments (Exhibit 74, and 74(a)-(f)). Petitioner's counsel indicated that the correct

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<sup>4</sup> The abandoned station occupies about 1400 square feet and was originally constructed in 1964 under Special Exception No. 1660.

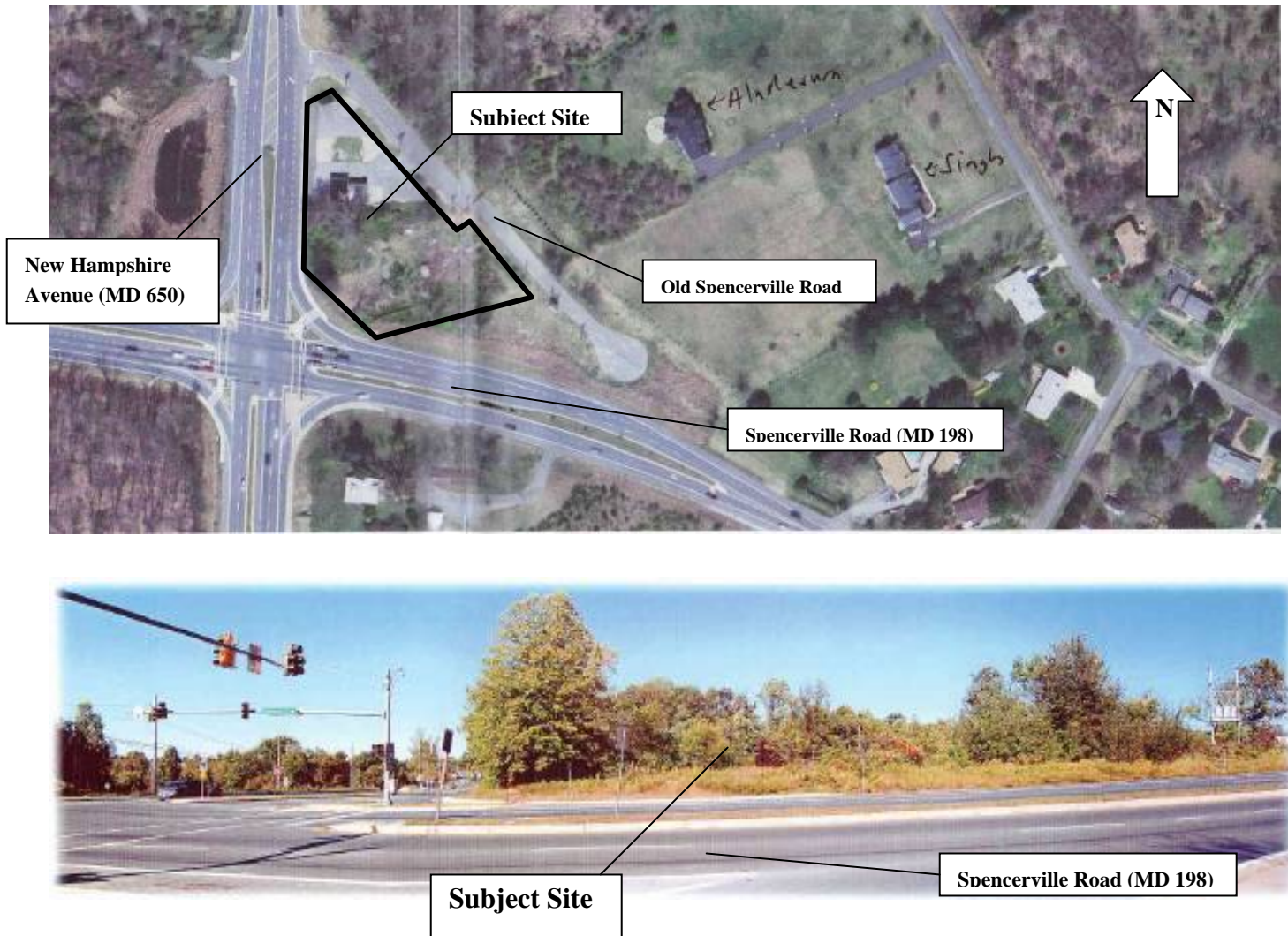
description of the site parcels is Lot N-890, Parcel P-864, and Parcel P-918; that the zoning maps are not up to date; that the SDAT maps are incorrect, as they often are; that the current property lines and lot/parcel designations on the special exception site were created at the time that a plat of subdivision (Plat No. 21453 (Exhibit 74(e))) was recorded on May 26, 2000;<sup>5</sup> that the new plat combined former Parcel A, Brown's Corner (N-839) with part of former Parcel 893 to form current Parcel B, Brown's Corner (now N-890); that the remaining portion of former Parcel 893 that was not included in this subdivision was given a new parcel number, current Parcel 864; that Parcel 918 was not affected by the subdivision and retains the same boundaries it had prior to May 26, 2000; that the lease document submitted by Petitioner as part of the current special exception application was signed in 1997, before the subdivision that eliminated N-839 and created N-890 took place; and that the current tax map KS13-P809 (Exhibit 74(c)), reproduced below, shows the current parcel numbers, as listed by Petitioner:



The site, as described by Petitioner's landscape architect, Gerald Eastridge, has some

<sup>5</sup> Petitioner's predecessor, Exxon Corporation, received special exception CBA-1660-A for a less extensive automobile filling station on this site in 1998, but the new station was never constructed and the special exception has lapsed.

natural grasses and existing trees in the southern portion of the site and is 10 feet higher in the southeastern corner of the site (across from Mr. Aladesuru's property) than in front of the proposed convenience store. Water on the site drains to the south and west. Tr. 123-124. The site can be seen in the following two photographs produced at the hearing, an aerial photograph (Exhibit 62) and a street level view from Spencerville Road, looking north (Top Image in Exhibit 58):

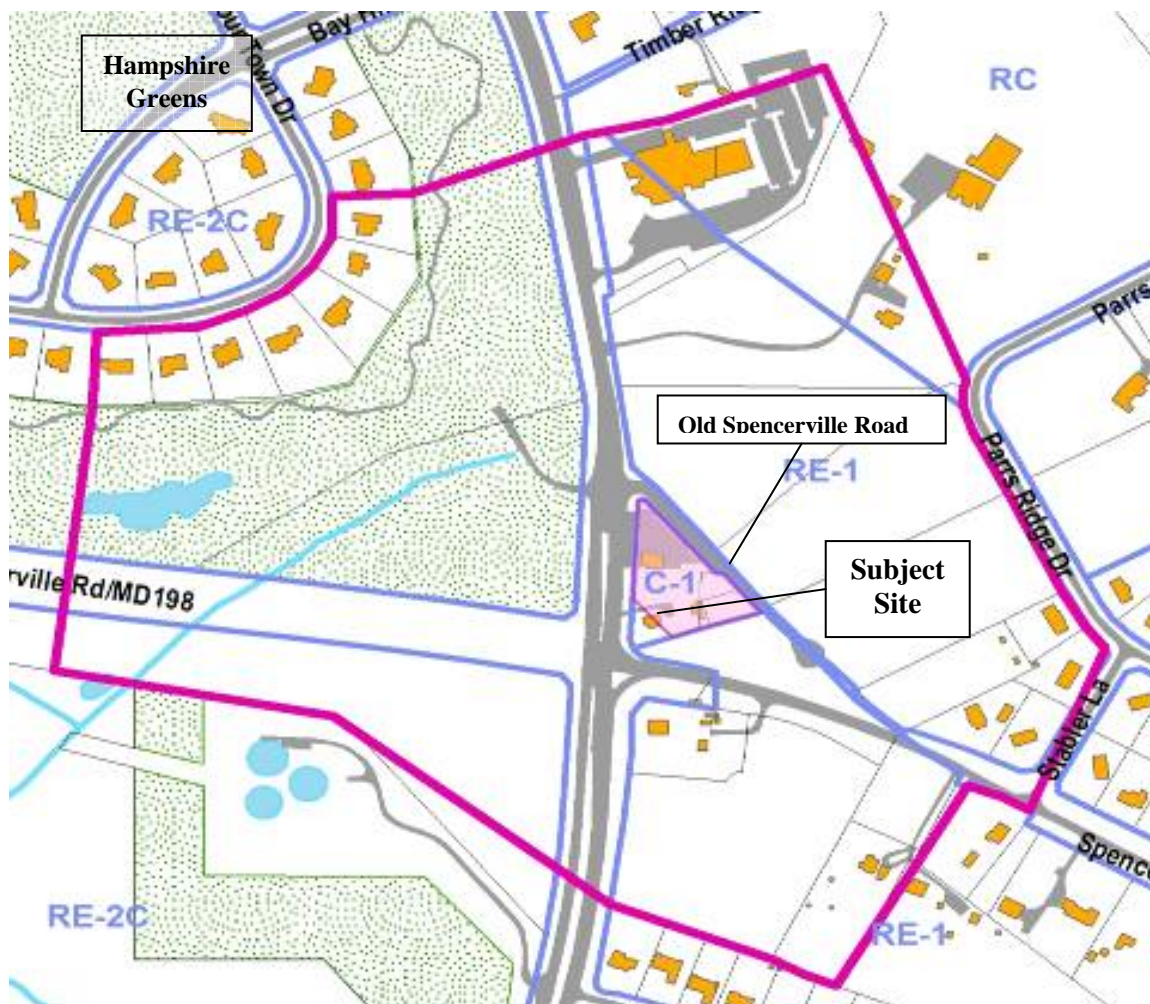


### B. The Neighborhood and its Character

Technical Staff defined the neighborhood “to include all properties within sight of the proposed station as well as peripheral properties that may be subject to noise, glare, or fumes associated with the proposed use.” Exhibit 49, pp. 6. As can be seen from the following



“Neighborhood Outline” Map (Exhibit 49, p. 7), the defined neighborhood does not precisely align with streets, but generally speaking, it is bordered by Harbor Town Drive (in the Hampshire Greens community) to the west, Timber Ridge Drive to the north, Parrs Ridge Drive to the northeast, Stabler Lane to the southeast and the southern side of properties south of Spencerville Road to the south.



The Hearing Examiner accepts this definition, as it covers the area containing those who will be most directly affected by the proposed service station.<sup>6</sup>

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<sup>6</sup> It should be noted that the surrounding neighborhood for land use purposes is not the same as the defined neighborhood for needs analysis, which will be discussed in Part II. F. of this Report. In evaluating the need for this business, Petitioner included potential users in a two mile ring surrounding the subject site, and the Technical Staff agreed with that definition.



The general neighborhood can also be seen on the following aerial photo (Exhibit 63):



Technical Staff described the general neighborhood in its report (Exhibit 49, pp. 6-7):

At the heart of the neighborhood is the intersection of New Hampshire Avenue and Spencerville Road, the stretch of roadway that would likely have the heaviest use from vehicles traveling to and from the proposed filling station. Although the subject property is zoned C-1, all surrounding properties in the neighborhood are zoned RE-1 or RE-2C, making the area predominantly residential and rural in character. All of the land immediately surrounding the proposed filling station is vacant or very sparsely populated. The most intense residential use in the vicinity of the proposed station is the golf course community of Hampshire Greens, located slightly to the northwest. The nearest home in the Hampshire Greens community is approximately 900 feet away from the subject site. Ashton is approximately two miles north on New Hampshire Avenue; Cloverly Town Center is approximately one mile south. . . . The only other special exception within the neighborhood as defined is a riding academy located to the north of the subject property that was approved on June 28, 1960.

To this description should be added the significant fact that two single-family homes, the Aladesuru residence at 1127 Parrs Ridge Drive and the Singh residence at 1131 Parrs Ridge Drive, have their back yards across Old Spencerville Road from the subject site, as can be seen on the aerial photo shown on page 7 of this report. They are the closest residential neighbors, with the Aladesuru home being 400 feet from the subject site and the Singh home 600 feet away. Tr. 129-130. There are also structures 180 feet across Spencerville Road, to the south, which housed a child-care center, now defunct. Tr. 63-64.

A broader view of the area around the subject site is shown on the Generalized Location Map appended to the Technical Staff report as Attachment 1, and reproduced below:



### C. The Master Plan

The property is located within the area covered by the Cloverly Master Plan, approved and adopted in 1997. The Cloverly Master Plan divides the planning area into three sections, a “Residential Wedge,” bordered on the north by an “Agricultural Wedge” and on the south by “Suburban Communities.” The subject property lies just inside the Residential Wedge, quite close to the Agricultural Wedge.

The Cloverly Master Plan contains general recommendations for evaluating special exception applications (page 37):

- *Maintenance of a residential appearance, where feasible.*
- *Compatibility with the scale and architecture of the adjoining neighborhood, consistent with the proposed use.*
- *The impact of signs, lighting, and other physical features on surrounding residential communities.*
- *Location of parking, loading, and other service areas to maintain residential appearances to the extent feasible.*
- *Options for landscaping that minimizes the non-residential appearance of the site and the view from surrounding properties and roads. It is preferable for landscaping to reinforce Cloverly’s rural character and be consistent with the streetscape standards . . . of the Master Plan and the landscaping standards for special exceptions.*
- *When special exceptions are adjacent to each other or to commercial properties, review whether it is feasible and reasonable to consolidate driveways and connect parking areas.*
- *Any special exception application that exceeds the recommended imperviousness level for a particular watershed in a SPA must be reviewed to determine compliance with the appropriate laws.*

The Master Plan also directly addresses the subject site (pages 20 & 21):

*Rezone two properties bordered by Old Spencerville Road, New Hampshire Avenue and Spencerville Road Relocated from RE-1 to C-1 . . . [i.e., the subject site]. Development of the entire C-1 zoned area at this location should be accomplished with the following design guidelines:*

- (1) *Commercial buildings should be located in a manner [that] maintains the rural character of New Hampshire Avenue with building setbacks comparable to adjacent properties.*
- (2) *Driveway entrances shall be minimized in width to maintain a safe and*

- clearly defined edge of pavement along New Hampshire Avenue.*
- (3) All proposed landscaping shall enhance and reinforce the rural character of New Hampshire Avenue and Spencerville Road. This shall be accomplished by screening all parking and internal vehicular circulation from the roadway with a low, evergreen hedge. A significant number of deciduous shade trees should be planted around the perimeter of the site to create a natural woodland setting.*
  - (4) If a gas station is the proposed use for the site, the configuration of the building and canopy should be sited so as to minimize visual impacts from New Hampshire Avenue and Spencerville Road in order to reinforce the rural character of the area.*
  - (5) Night lighting shall be located predominantly under the canopy to avoid glare and excessive lighting [that] is incompatible with the rural setting.*

After Petitioner agreed to remove the direct access to New Hampshire Avenue which it had initially been planned and replace it with a continuous landscaping strip along New Hampshire, Technical Staff concluded that the proposed use is consistent with the Cloverly Master Plan. Exhibit 49, p. 11.

The Hearing Examiner felt, after the hearing, that the record did not contain sufficient data to fully evaluate the compatibility of a commercial structure of the proposed size with the surrounding residences and rural setting, as called for in the Master Plan.<sup>7</sup> He therefore issued an order (Exhibit 75) directing Petitioner to supplement the record, which it did on April 28, 2008 (Exhibit 83). The additional materials demonstrate that the proposed building's size (3,250 square feet) is actually smaller than the size of the convenience store building approved by the Board of Appeals for this site in 1998 (CBA-1660-A, Exhibit 83(a)). Moreover, if Petitioner's did not construct a service station (which requires a special exception), a considerably larger commercial structure could be erected on this site in the C-1 Zone, as a matter of right.

Based on this record, the Hearing Examiner finds, as did Technical Staff, that the proposed use is in conformance with the Master Plan, which emphasizes factors other than size in evaluating compatibility with the area. Compatibility is discussed further in Parts II. D. and G. of this report.

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<sup>7</sup> The Hearing Examiner is not concerned about the compatibility of the architecture and façade of the proposed gas station, since Petitioner has gone to some lengths to give it a rural appearance, as described in Part II. D. of this report.



### **D. The Proposed Use**

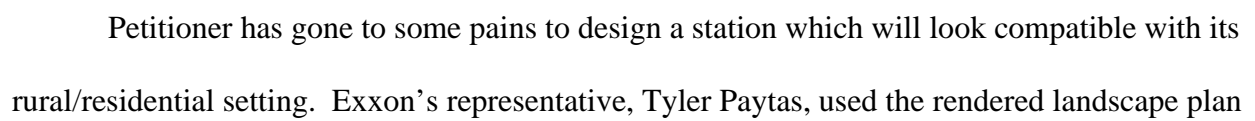
Petitioner, ExxonMobile Corporation seeks a special exception pursuant to Section 59-G-2.06 (Automobile Filling Station) of the Zoning Ordinance to permit the construction and operation of an automobile filling station with an ancillary convenience store and car wash.

Petitioner proposes to:

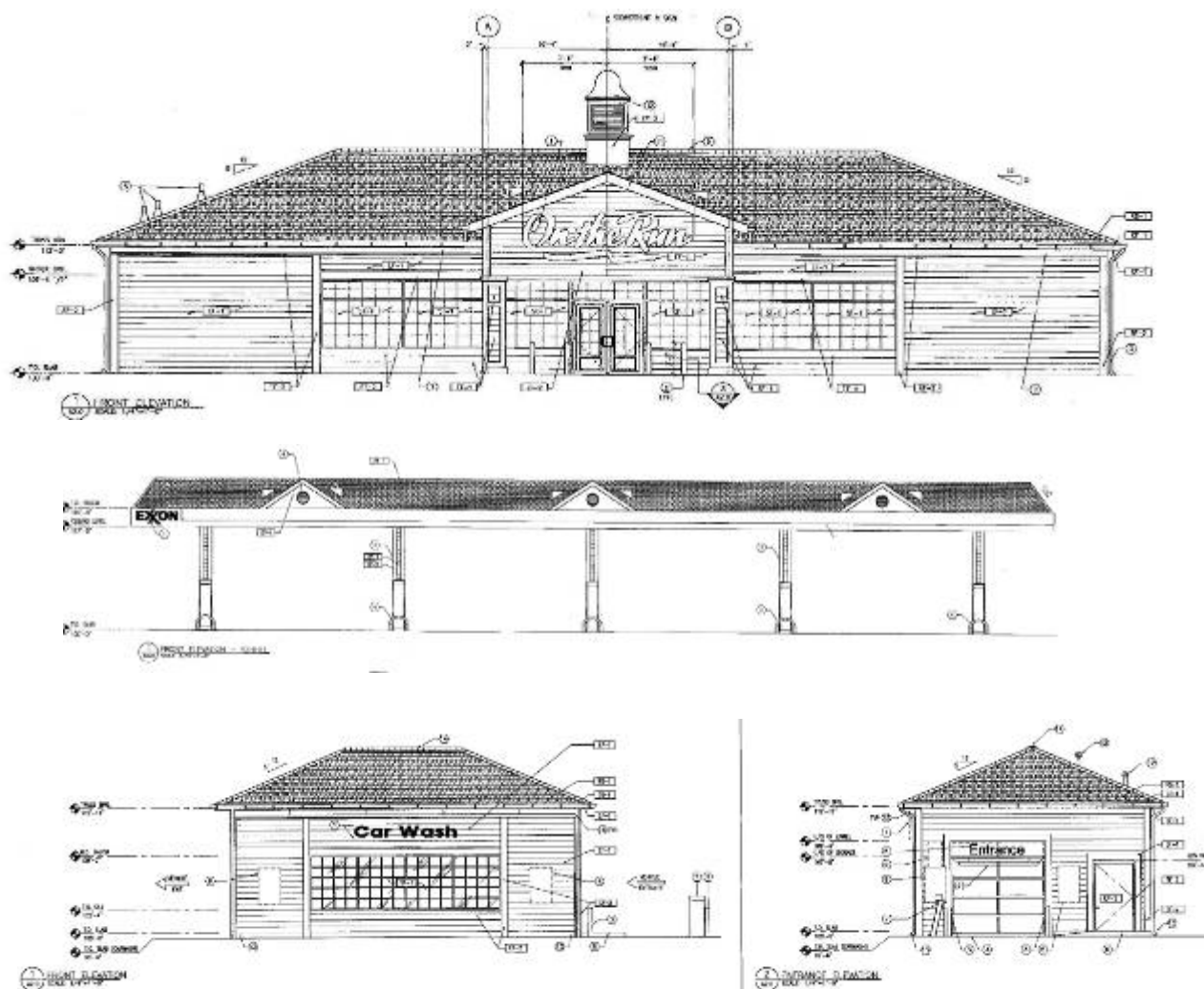
- 1) Raze the existing abandoned gas station and replace it with five canopied gas pump islands and fuel dispensers and a total 10 fueling positions, two of which will also dispense diesel fuel. The station will be oriented to face the intersection of Spencerville Road (MD 198) and New Hampshire Avenue (MD 650), and will thus be at a 45 degree angle to both of those roads. The pump island canopy would measuring 26 feet by 121 feet 4 inches;
- 2) Construct a “state of the art” underground, double-walled, fuel storage tank;
- 3) Erect a one-story, 3,250 square-foot, service building containing a convenience store with 1,770 square-feet of patron area and the remainder for storage and rest rooms;
- 4) Provide twenty-six parking spaces, including two handicap spaces, for the convenience store;
- 5) Erect an 864 square-foot car wash, which will be an automated, single-bay facility with sufficient space to be provided for stacking of waiting cars;
- 6) Provide car vacuum cleaners apart from the car wash;
- 7) Post two monument signs identifying the gas station;
- 8) Operate the gas station and convenience store from 5 a.m. until midnight, seven days a week; the carwash will operate from 8 a.m. until 9 p.m., and at all other times it will be closed and unavailable for use;
- 9) Employ a total of seven people, but there will be a maximum of four per shift;
- 10) Construct two full-movement driveways to access the site from Old Spencerville Road and one entrance-only driveway to access the site from Spencerville Road (MD 198). There will be no direct access from New Hampshire Avenue (MD 650); and
- 11) Provide adequate screening to protect the neighbors from adverse effects and to maintain the rural character of the adjacent streets.

Petitioner’s vision for the station is illustrated in the bottom image on Exhibit 58 (shown below),<sup>8</sup> and in its rendered landscaping plan (Exhibit 54), shown on the next page :



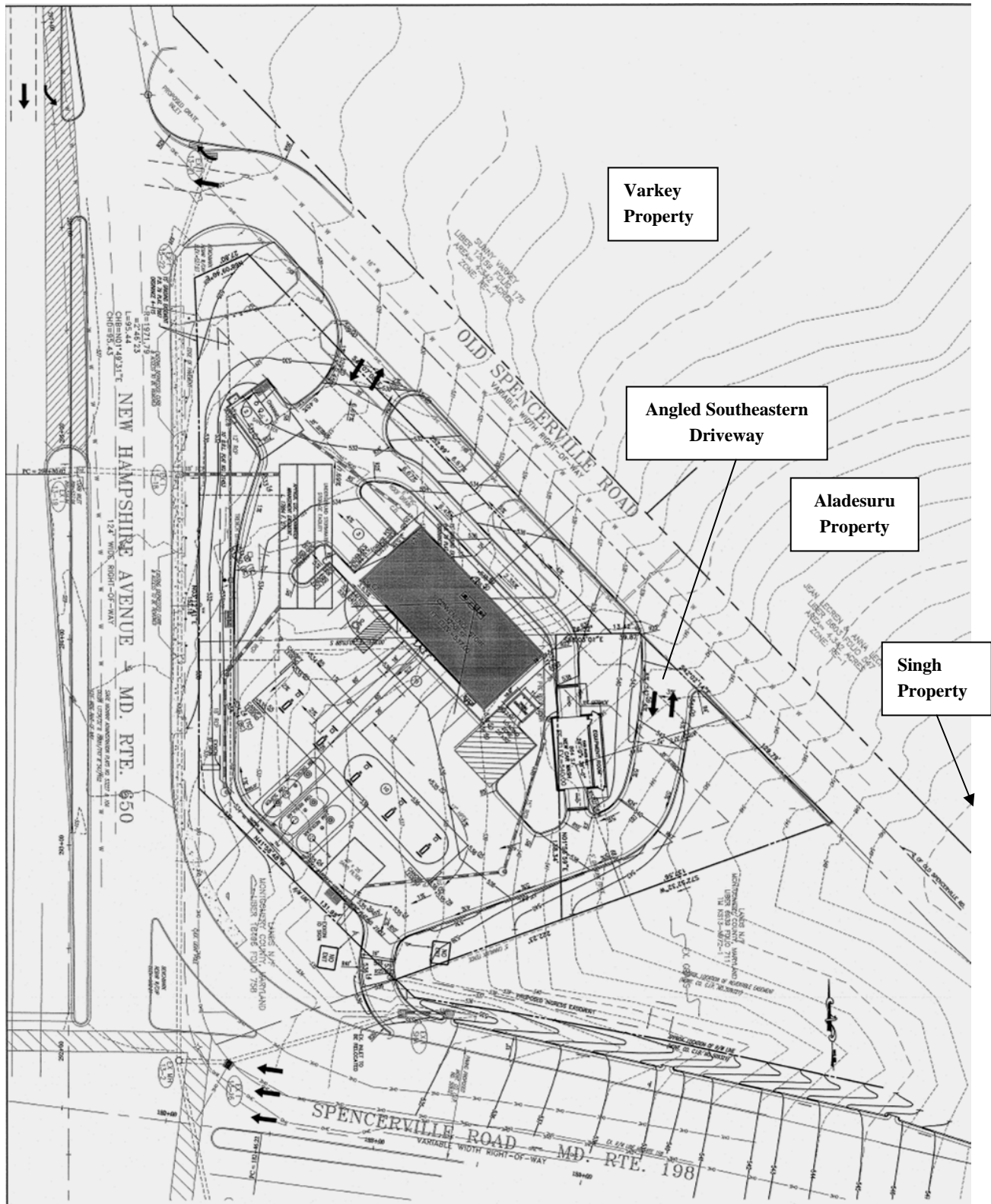


(Exhibit 54), rendered elevations (Exhibits 55, 56 and 57) and a “Conceptual Site Perspective” (Exhibit 58) to demonstrate that Exxon was using its highest quality architectural design to make this gas station compatible. Tr. 22-31. Features include hip roofs with asphalt shingles (on the canopy, as well as on the other structures), tan clapboard siding, mullions in the windows, and a cupola on the service building to give the structures a more residential, rural look. Even the trash enclosure will be wrapped in the same material as the convenience store, car wash, and canopy with the clapboard siding to match. Many of these elements can be seen in elevations filed by Petitioner (Exhibits 27 (f), (g), (h) and (i)):





A white picket fence is to be erected along the New Hampshire Avenue street frontage along with substantial landscaping to further the property's rural theme and to provide more separation and screening from the road. The layout of the facility is shown below on the revised site plan (Ex. 90(j)).



As can be seen, this modification to the site plan angled the southeastern driveway to avoid headlight glare into confronting back yards, as noted by Petitioner in Exhibit 80.<sup>9</sup> The revised site plan contains a revised Note 11, which recalculated required and provided parking. It is reproduced below:

SITE INFORMATION:

1. TOTAL NUMBER OF LOTS: 3 PARCELS
2. TAX MAP/PARCEL/TAX ACCOUNT/DEED NUMBERS  
 JS63 NB90 05-00256371 LIBER 10288 FOLIO 618  
 KS13 P864 05-00269225 LIBER 31676 FOLIO 651  
 KS13 P918 05-00249193 LIBER 31676 FOLIO 651
3. PRESENT ZONING: C-1
4. PROPOSED ZONING: C-1
5. PRESENT USE: ABANDONED AUTOMOBILE FILLING STATION WITH 2 BAY FACILITY
6. PROPOSED USE: AUTOMOBILE FILLING STATION WITH ANCILLARY CONVENIENCE STORE AND CARWASH 5MPD STATION
7. ELECTION DISTRICT: 5
8. SITE ADDRESS: 16255 NEW HAMPSHIRE AVE.  
SILVER SPRING, MD 20905
9. TOTAL COMBINED LOT AREA: 1.25 ACRES
10. GREEN SPACE:  
 REQUIRED: 10% OF LOT AREA = .125 ACRES  
 PROVIDED: .5 ACRES
11. PARKING:  
 REQUIRED:  
 ANCILLARY RETAIL, 5 SPACES/ 1000 SF.x 1449 SF. (PATRON AREA IS 1449 S.F.)= 7 SPACES  
 CARWASH, 2/CARWASH BAY = 2 SPACES  
 SERVICE STATION, 1 SPACE/EMPLOYEE = 4 SPACES  
 TOTAL PARKING REQUIRED = 13 SPACES  
 TOTAL PARKING PROVIDED = 16 SPACES (14 AT STORE, AND 2 AT VACUUMS)
12. SETBACKS:  
 BUILDING SETBACK FROM NEW HAMPSHIRE AVENUE (RIGHT-OF-WAY ESTABLISHED ON A MASTER PLAN) IS 10'. BUILDING SETBACK FROM OLD SPENCERVILLE ROAD (NO MASTER PLAN SHOWING THE RIGHT-OF-WAY LINE) IS 60' FROM THE CENTER LINE OF THE STREET.  
 SETBACK REQUIREMENT FROM ADJOINING RE-1 ZONED LAND TO THE EAST IS 35', THE APPLICABLE REAR YARD SETBACK FOR THE RE-1 ZONE.
13. THE PROPOSED DAYS/HOURS ARE: 7 DAYS/WEEK, 5:00 A.M. TO 12:00 MIDNIGHT FOR THE AUTOMOBILE FILLING STATION, AND 7 DAYS/WEEK, 8:00 A.M. TO 9:00 P.M. FOR THE CARWASH.
14. CONSOLIDATION PLAT TO BE RECORDED AFTER THE BOARD OF APPEALS APPROVAL OF THE SPECIAL EXCEPTION.
15. STORM WATER QUANTITY MANAGEMENT AND QUALITY MANAGEMENT WILL BE ADDRESSED WITH MONTGOMERY COUNTY DEPARTMENT OF PERMIT SERVICES. SWM CONCEPT PLAN WAS APPROVED ON OCTOBER 24, 2007.

MONTGOMERY COUNTY ZONING ORDINANCE REFERENCES:

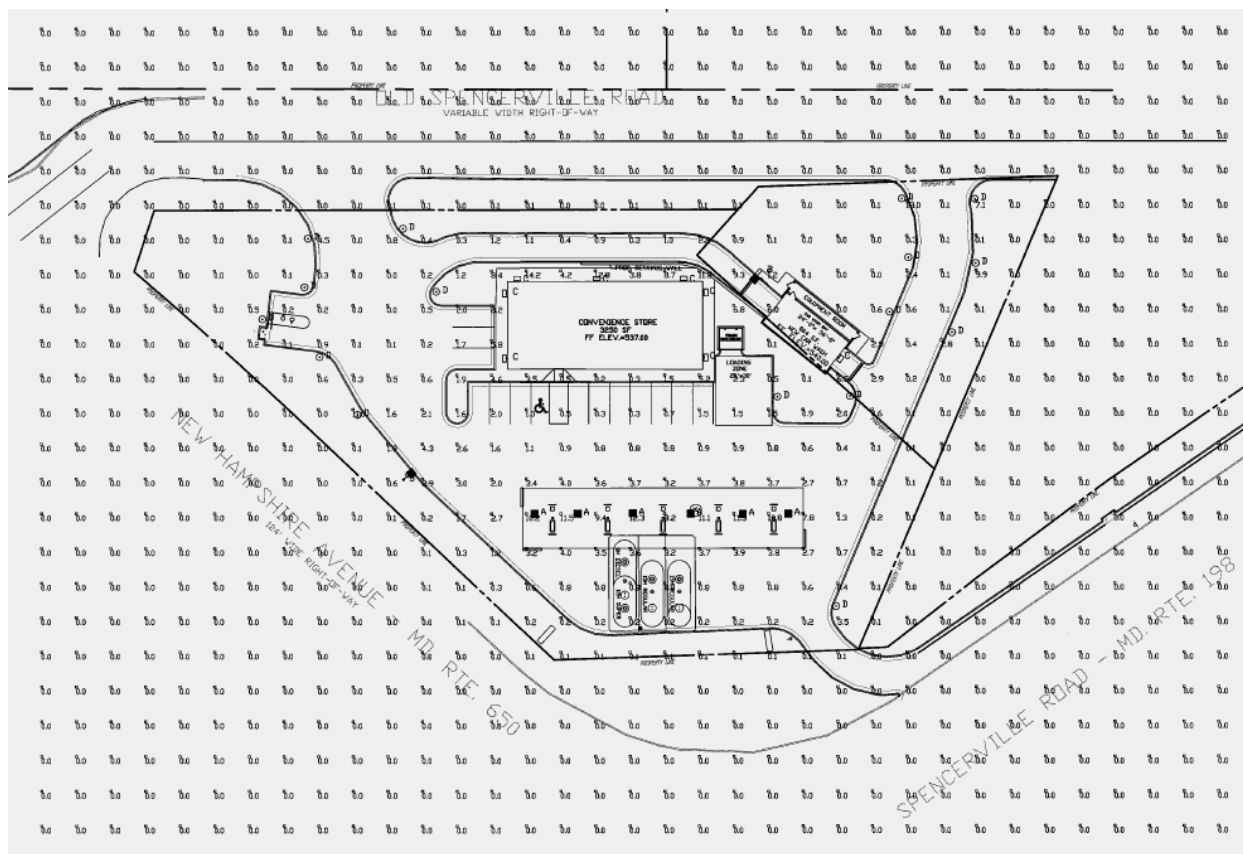
1. PARKING: 59-E-3.7 (AUTOMOBILE FILLING STATION, RETAIL GENERAL)
2. SPECIAL EXCEPTIONS: 59-A4.22
3. LANDSCAPING: 59-E-2.7
4. PARKING SETBACKS: 59-E-2.81
5. BUILDING RESTRICTION LINES: 59-C-4.343
6. SIGNAGE: 59-F-4.2
7. C-1 ZONE: 59-C-4.34

<sup>9</sup> Unfortunately, the reconfiguration of the southeastern driveway appears to run afoul of the requirement in Zoning Ordinance §59-G-2.06(b)(5) that "all driveways shall be perpendicular to the curb or street line." This issue is discussed in Part IV. C. of this report, in connection with that statutory provision.

According to Technical Staff, the products for sale in the convenience store would be those commonly available in other filling station convenience stores, such as motor oil, wiper fluid, and car accessories. Additionally, the store will offer coffee, soft drinks, snack food, cigarettes, and news publications.

The fully automatic, single-bay car wash will be housed in an 864 square foot building slightly to the southeast of the convenience store. It is proposed that vehicles will enter the car wash by way of a dedicated car wash lane behind the convenience store so cars in queue will be less visible to the street.

The lighting is designed to shield light and glare and direct it to prevent spillover. When the station is completely closed, there will be some lighting under the canopy just for safety and a few of the bollard lights around the property, but the main area lights will be turned off. The revised Lighting and Photometric Plan (Exhibit 68(e)), shows that light spillage does not exceed 0.1 footcandles at the side and rear property lines:

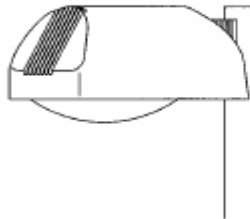


Luminaire Schedule						
Symbol	Qty	Label	Arrangement	Lumens	LLF	Description
	2	B	SINGLE	32000	0.720	CHV FP 386 PSMV CT HSS SINGLE ON 12' POLE
	8	C	SINGLE	12800	0.720	CHVS FT 175 MH MT
	16	D	SINGLE	8500	0.720	VBR 1D 100 MH CA
	6	A	SINGLE	16000	0.720	ECTA S 175 PSMV MT C73
						Total Watts
						368
						210
						129
						235

Maintained Footcandle

Numeric Summary					
Label	Avg	Max	Min	Avg/Min	Max/Min
ALL CALC POINTS	0.53	14.2	0.0	NA	NA

Statistical Area Summary					
Label	Avg	Max	Min	Avg/Min	Max/Min
CANOPY	6.90	12.3	2.7	2.56	4.56
INSIDE CURB	1.46	9.3	0.0	NA	NA

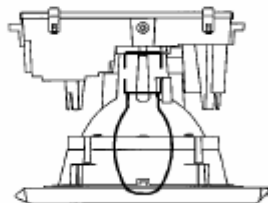


# CHALLENGER



# CHALLENGER WALL SCONCE

ECTA LOW FLAT LENS



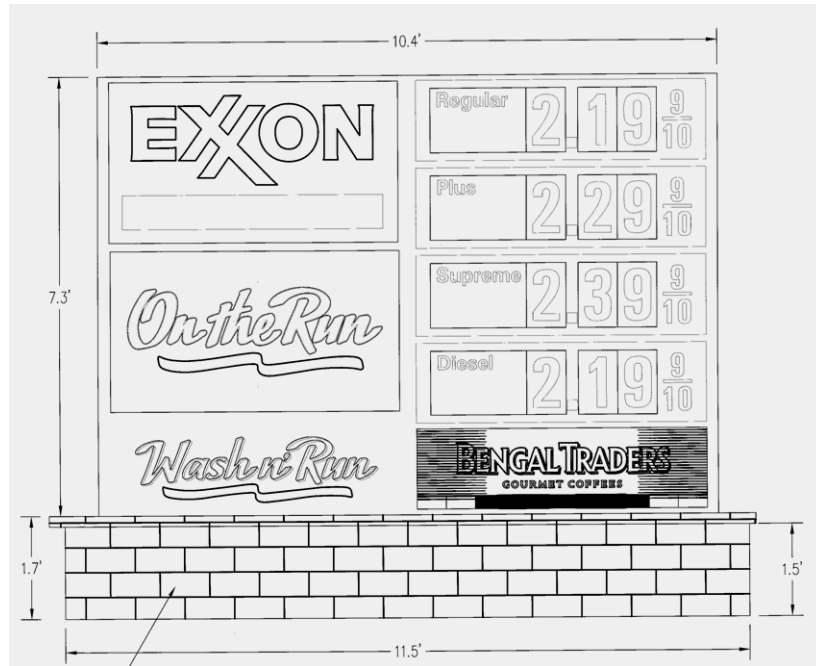
100W 175/250/300W F/C73  
E80A FULL-CUT OFF CLASSIFIED

THIS IS NOT AN LSI RECOMMENDED LIGHT LAYOUT.

LSI IS NOT RESPONSIBLE FOR SAFETY AND  
SECURITY RISKS DUE TO INADEQUATE LIGHT LEVELS.

Instead of the usual Exxon Pylon sign, there will be a ground mount monument sign on the south property line near the right-in access from Spencerville Road. The other monument sign is located along New Hampshire Avenue. The brick base of the signs will match the color of the

convenience store. The proposed signs will be 9 feet tall and 10.4 feet wide, as shown in the sign plan (Exhibit 68(f)):



The HVAC equipment will be behind the mechanical enclosure on the rear of the convenience store, centered in the middle of the building. It is open on top, but Exxon utilizes brand new equipment which has very low decibel levels, ranging from 40-50 decibels directly within two feet of the equipment. It would not exceed the county noise level maximums. Tr. 41-43. As to the car wash, inside a 20 foot radius, it is about 60 decibels, but outside of the 20 foot radius, it drops below the ambient noise level of the site generated by New Hampshire Avenue and Spencerville Road. Tr. 47. Vacuum cleaners will be located on the Northwest corner of the site

Deliveries for the convenience store will be made on its east side, through the front entrance. The convenience store, at most, occupies 1770 square feet<sup>10</sup> of the 3250 square foot service building. The rest is storage and rest rooms. Tr. 45-46.

<sup>10</sup> Although Mr. Paytas referred to the convenience store floor area as 1800 square feet (Tr. 46), the Hearing Examiner believes he was giving the approximate size, because Technical Staff recommended a limit of 1770 square feet. Exhibit 49, p. 1. Petitioner also modified its own estimate of patron area after the hearing, asserting that a recalculation by its engineers revealed a patron area of 1,449 square feet (Exhibit 90, p. 6, n. 1, and Exhibit 90(j), revised site plan, note 11).

**PERIPHERAL PARKING LOT LANDSCAPING**

LOCATION	LENGTH	TREE	RECOMMENDATION	TREES REQUIRED/TREES PROVIDED
NORTHWESTERN	200'	SHRUB/CLIMB	1 TREE PER 40'	5
EASTERN	222'	PROSPERITY LANE	1 TREE PER 40'	6
SOUTHWESTERN	132'	PROSPERITY LANE	1 TREE PER 40'	4
WESTERN	242'	SHRUB/CLIMB	1 TREE PER 40'	6







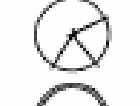
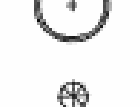


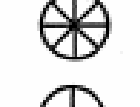
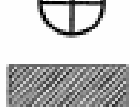





**GREENSPACE**

PERCENTAGE REQUIRED	PERCENTAGE PROVIDED	LANDSCAPE AREA REQUIRED	LANDSCAPE AREA PROVIDED	PERCENTAGE PROVIDED
10.0%	10.0%	10.0%	10.0%	100%

**TOTAL SITE AREA** 10.00 AC  
**PERCENTAGE PROVIDED** 10.0%  
**LANDSCAPE AREA PROVIDED** 1.00 AC  
**PERCENTAGE REQUIRED** 10.0%  
**LANDSCAPE AREA REQUIRED** 1.00 AC  
**PERCENTAGE PROVIDED** 100%

**NOTE: TREES TO BE PLANTED OFF-SITE IF AGREED TO BY PROPERTY OWNERS.**

## PLANT SCHEDULE

	5	<i>Acer saccharum</i> 'Commemoration' COMMEMORATION SUGAR MAPLE	3-3 1/2" CAL.	B & B	SPACE AS SHOWN
	5	<i>Cladrastis kentuckea</i> KENTUCKY COFFEE TREE	3-3 1/2" CAL.	B & B	SPACE AS SHOWN
	2	<i>Liquidambar styraciflua</i> AMERICAN SWEETGUM	3-3 1/2" CAL.	B & B	SPACE AS SHOWN
	2	<i>Quercus coccinea</i> SCARLET OAK	3-3 1/2" CAL.	B & B	SPACE AS SHOWN
	8	<i>Quercus phellos</i> WILLOW OAK	3-3 1/2" CAL.	B & B	SPACE AS SHOWN
	9	<i>Amelanchier canadensis</i> JUNEBERRY	8-10' HT.	B & B	SPACE AS SHOWN
	2	<i>Cercis canadensis</i> EASTERN REDBUD	8-10' HT.	B & B	SPACE AS SHOWN
	5	<i>Cornus florida</i> FLOWERING DOGWOOD	8-10' HT.	B & B	SPACE AS SHOWN
	32	<i>Prunus laurocerasus</i> 'Otto Luyken' OTTO LUYKEN CHERRY LAUREL	30-36" HT.	-	SPACE AS SHOWN
	34	<i>Fothergilla major</i> 'Mt. Airy' MT. AIRY FOTHERGILLA	36-42" HT.	-	SPACE AS SHOWN
	7	<i>Ilex x. attenuata</i> 'Foster' FOSTERS HOLLY	4-5' HT.	B & B	SPACE AS SHOWN
	3	<i>Pinus strobus</i> EASTERN WHITE PINE	10'-12' HT.	B & B	SPACE AS SHOWN
	5	<i>Cupressocyparis leylandii</i> LEYLAND CYPRESS	4-5' HT.	B & B	SPACE AS SHOWN
	158	AMSONIA 'Blue Ice' BLUE ICE AMSONIA	1 QT.	CONT.	18" O.C.
	116	Muhlenbergia capillaris PINK MUHLY GRASS	1 GAL.	CONT.	24" O.C.
	273	Panicum virgatum 'Heavy Metal' SWITCH GRASS	1 GAL.	CONT.	24" O.C.
	414	Rudbeckia fulgida 'Goldsturm' BLACK EYED SUSAN	1 GAL.	CONT.	24" O.C.



**INTERIOR PARKING LOT LANDSCAPING**

PERCENTAGE REQUIRED	PARKING LOT AREA	LANDSCAPE AREA REQUIRED	LANDSCAPE AREA PROVIDED	PERCENTAGE PROVIDED
5.0%	10,262 SF	531 SF	1,034 sf	10%

**GREENSPACE**

TOTAL SITE AREA	54,603 SF		
IMPERVIOUS SURFACE AREA	33,094 SF	% OF TOTAL SITE	61%
GREENSPACE AREA	21,509 SF	% OF TOTAL SITE	39%

**PERIPHERAL PARKING LOT LANDSCAPING**

LOCATION	LENGTH	TYPE	REQUIREMENT	TREES REQUIRED	TREES PROVIDED
NORTHEASTERN	392'	Street R.O.W.	1 TREE PER 40'	10	12
SOUTHERN	222'	PROPERTY LINE	1 TREE PER 40'	6	6
SOUTHWESTERN	132'	PROPERTY LINE	1 TREE PER 40'	4	4
WESTERN	248'	Street R.O.W.	1 TREE PER 40'	6	7

The requirement for perimeter planting around the site is one tree per 40 feet. Petitioner will plant a variety of trees to provide a buffer from the outside of the site. In the opinion of Gerald Eastridge, Petitioner's expert in landscape architecture, the plantings will have an aesthetically pleasing natural appearance, and will be an effective screen, particularly as the plants mature. The shade trees will be 3.5 inches in caliper, which is about 14-16 feet in height with a spread of probably 8-10 feet when planted. Petitioner's exhibits show them at eight years after planting. Petitioner had intended to plan deciduous trees, but agreed to a mix of deciduous and evergreen trees. Considering the distance to the homes and the planned landscaping, Mr. Eastridge does not feel that a screening wall would be necessary or make a difference. Tr. 124-127. For the reasons discussed in the next section of this report, the Hearing Examiner finds that a board-on-board or solid wood fence, on the east side of Old Spencerville Road, is necessary to prevent the glare and noise of a large number of new vehicle trips on Old Spencerville Road from disturbing the confronting neighbors to the east.

In addition to the required buffer, Petitioner also will provide understory planting – a mixture of evergreens, some deciduous, but mostly evergreen shrubbery, and some of them will be

three to four feet in height. There will be a mix of plants to provide an attractive residential appearance and to screen the cars that will be moving through the site. According to Mr. Eastridge, it would be very difficult for someone 300 feet away to see more than the roof of the building over the screening because the convenience store will be at a lower elevation than properties to the east, Tr. 125-126.

The gas station is proposed to be in operation seven days a week, from 5:00 AM until midnight. The car wash hours will be limited to 8:00 AM until 9:00 PM.. Normally three employees will be necessary for the operation of the facility; however, there may be times when four employees are needed on site for specific purposes. Exhibit 49, p. 10. The gas delivery truck will come in through the Old Spencerville Road, and will arrive at the site about 11:00 a.m. or 12:00 noon every 48 hours, or so. A late delivery might be made if the station were about to run out, but that is not the plan. Bread deliveries for the convenience store are typically made around 6:00 or 7:00 in the morning. Tr. 57-59.

### **E. Traffic, Parking and the Environment**

#### **1. Traffic:**

##### **Local Area Transportation Review:**

Petitioner's transportation planner, Nancy Randall, prepared a traffic impact analysis for the proposed use based on the scope-of-study determination made by Technical Staff. In accordance with Local Area Transportation Review (LATR) standards, Staff specified the numbers of intersections that need to be addressed, the basis for the directional distribution of the site traffic, the background development, and the approved projects that are in the pipeline but have not yet been constructed or fully occupied. As a result, seven different intersections were examined: Norwood Road and Norbeck Road extended, New Hampshire Avenue and Spencerville Road and Norbeck Road extended, Spencerville and Good Hope Road, New Hampshire Avenue and Ednor Road, New

Hampshire Avenue and Old Spencerville Road, New Hampshire Avenue and the site access point, and New Hampshire Avenue and Briggs Chaney Road. Tr. 94-95.

Petitioner's original site plan proposed access to the filling station by way of one full-movement driveway off of Old Spencerville Road, an exit-only driveway for the car wash onto Old Spencerville Road and a right-in, right-out driveway along New Hampshire Avenue (MD 650). Exhibit 23(a), p. 19 and original site layout (Exhibit 4(a)). According to Ms. Randall, the State Highway Administration, Technical Staff and the County's Department of Public Works and Transportation (DPWT) determined that the New Hampshire Avenue access point should be eliminated for safety reasons. Instead of the New Hampshire Avenue access, an entrance-only driveway was added directly off of MD Route 198, and two full entrance/exits were designed for access along Old Spencerville Road, as shown on the current plans. Tr. 95-96.

Ms. Randall provided an addendum (Exhibit 43) to the original report (Exhibit 23(a)) addressing this one change in the access. The second report only affects the original site access which is now closed, and the proposed new access. There will be a change in the volume at Old Spencerville Road and New Hampshire Avenue, but the outlying intersections beyond the immediate site remain unchanged. Tr. 96.

Ms. Randall did traffic counts during the peak hour of the peak AM and PM peak periods as each intersection (*i.e.*, existing traffic), and combined that data with data about projects already in the pipeline (*i.e.*, background traffic). Data was collected from 6:30 to 9:30 in the morning during the weekday and then from 4:00 to 7:00 in the evening.

The site itself was then analyzed. Following instructions from Technical Staff, Ms Randall used the LATR Guidelines Trip Generation projection for automobile filling stations with a convenience store and a car wash (Table A-6, Page 41) to determine the number of trips it is anticipated that the proposed use would generate during the AM and PM peak hours. Based on that

formula, a filling station with ten pumping positions, a convenience store and a car wash would generate a total of 173 AM peak hour trips and 218 PM peak hour trips. Using the same LATR Guideline, Ms. Randall determined that a portion of those trips are “pass-bys,” pulled from the existing traffic stream – sixty percent in the morning and fifty percent in the evening. Thus, of the total of 173 trips coming in and out of the site, 104 are pass-bys in the morning, and in the evening 109 are pass-bys, so the new trips to the area road system would be 69 in the morning and 109 in the evening.

When those new trips were added to the existing and background traffic at the studied intersections, Ms. Randall determined that none of the intersections exceeded the critical lane volume (CLV) congestion standard specified for the Cloverly study area of 1475 CLV. Technical Staff agreed with her conclusion that all of the studied intersections are operating within that standard and will continue to do so when background and newly generated trips from the proposal are counted in. Exhibit 49, Attachment 6. Tr. 96-99.

Ms Randall also testified that the Cloverly Policy Area has sufficient capacity, so there are no Policy Area Mobility Review (PAMR) requirements for the Cloverly area.<sup>11</sup> She concluded that the proposal not only meets the current regulations but also meets the new regulations relating to traffic impact. Tr. 99-103.

*Impact of New Traffic Volume on Properties Along Old Spencerville Road*

All the evidence supports Ms. Randall’s conclusion that the proposed use meets LATR standards. However, that conclusion means only that the proposed use will not put an excessive burden on the area transportation system; it does not mean that the addition of all those new trips will

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<sup>11</sup> PAMR was adopted by the Council as part of the new Growth Policy in November of 2007, but on the day of the hearing (February 26, 2008), the Council passed Zoning Text Amendment 07-17 (Ordinance No. 16-14, effective March 17, 2008), which provides that the new Growth Policy does not apply to special exception applications filed before the new Growth Policy was adopted. Since this application was filed on March 8, 2007, the new Growth Policy does not apply to this special exception. However this special exception also has to go through subdivision, and the PAMR requirements will presumably apply at subdivision.

have no adverse impact upon the closest neighbors. Although not mentioned by either Ms. Randall or Transportation Division Technical Staff until queried by the Hearing Examiner in an order (Exhibit 84) issued after the hearing, the fact that some of the trips to the station are “pass-bys” will not reduce the impact of the trips on Old Spencerville Road, for **all** the new trips by vehicles departing the station (pass-bys and original trips) and a large chunk of the arriving vehicles (pass-bys and original trips) will have to pass through Old Spencerville Road, which they never did before. Old Spencerville Road is a presently dead-end street, with nothing on it except an abandoned gas station and a few back yards. It therefore “carries no traffic” now. Exhibit 23(a), p. 5. When the new gas station opens, every exiting vehicle will have to pass through Old Spencerville Road, because the only exits from the proposed gas station will be on Old Spencerville Road. To the neighbors, it is irrelevant that some of the new trips may come from cars already on the overall road system (*i.e.*, pass-bys). To Old Spencerville Road, they are all new trips. This is a non-inherent characteristic of the site.<sup>12</sup>

Since there is one entrance from Route 198, some of the trips into the station will not be from Old Spencerville Road. All of the outgoing trips will be onto Old Spencerville Road, and a significant portion of the incoming trips will arrive by that route.<sup>13</sup> Since there are a total of 218 new trips in the evening peak hour, the Hearing Examiner calculated that about 157 trips will utilize Old Spencerville Road, passing nearby the Singh and Aladesuru residences in just a one hour period every

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<sup>12</sup> Technical Staff disagrees, arguing that because Old Spencerville Road is “a road,” it should be anticipated by the adjacent landowners that it may carry traffic even though it “has seen very little traffic in recent years.” Exhibit 91, p. 1. The Hearing Examiner considers this characteristic non-inherent because it is an unusual site condition which will result in adverse effects on the neighbors (*i.e.*, a large increase in trips where none existed before).

<sup>13</sup> Since the 218 trips include both arrivals and departures, 109 trips will arrive and 109 will leave. The ones leaving (109) will all utilize Old Spencerville Road. The Hearing Examiner was not able to determine directly from the record how many of the arriving trips will arrive on Old Spencerville Road and how many will arrive through the MD 198 entrance, so he extrapolated from the evidence submitted by Petitioner’s expert. Ms. Randall’s supplemental traffic analysis (Exhibit 43(a), Table 1) indicates that about 44% of the PM CLV at the access points (*i.e.*, 44% of the combined CLV of items #5 and #6 on Table 1) will use Old Spencerville Road. Applying that percentage to the 109 arriving trips means that about 48 trips will arrive at the station in the PM peak hour over Old Spencerville Road. That yields a total of 157 trips over Old Spencerville Road during the evening peak hour (48 arriving + 109 departing).

weekday evening.<sup>14</sup> Though the other hours in the day will see less traffic, it will still add up to a significant flow. In response to the Hearing Examiner's order, Technical Staff estimated that the proposed station would generate 1,528 to 1,686 new trips per day on Old Spencerville Road (Exhibit 91(b)). Petitioner's transportation planner, Nancy Randall, responded with an estimate that the proposed station would generate 2,193 new trips per day on Old Spencerville Road, but opined that only about 15% of these trips would use the southeastern driveway opposite Mr. Aladesuru's back yard.<sup>15</sup> Exhibit 90(d). Petitioner's counsel noted that the Singh's property is not directly across from the gas station site and that another confronting neighbor, Sunny Varkey, had not objected to the gas station plan. Exhibit 90, p. 4.

The Hearing Examiner accepts Ms. Randall's observation that only a portion of the new traffic on Old Spencerville Road will use the southeastern driveway, but is not convinced that it will be only 15% of the new traffic. The Hearing Examiner is still concerned about the impact of new trips that will be generated on Old Spencerville Road under the present plan. The fact that one of the confronting property owners (Sunny Varkey) has not formally opposed the petition does not eliminate the Hearing Examiner's obligation to insure that his property will not suffer undue adverse effects from the granting of a special exception across the street from him.<sup>16</sup>

While angling the southeastern driveway might have helped to some degree, the Hearing Examiner believes that such non-perpendicular driveway violates Zoning Ordinance §59-G-2.06(b)(5), for the reasons discussed in Part IV. C. of this report. Adding a few replacement trees on Mr. Aladesuru's property is also unlikely to solve the problem, as he points out in his letter (Exhibit 85). The Hearing Examiner therefore explored other potential avenues to reduce the volume of traffic

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<sup>14</sup> Those residences front on Parrs Ridge Drive.

<sup>15</sup> Ms. Randall observed, as well, that before Old Spencerville Road was closed off to through traffic, over a decade ago, it used to carry a heavy stream of traffic. The Hearing Examiner does not consider this point to be relevant in evaluating the likely impact of the proposed station today.

<sup>16</sup> Maryland real property tax records, of which the Hearing Examiner takes official notice, do not indicate that Mr. Varkey's property (Parcel P809, tax map KS13) currently has a residential use.

on Old Spencerville Road, including reducing the size of the proposed convenience store, reducing the number of proposed gas pumps or eliminating the proposed car wash. Based on a variety of responses from Technical Staff and Petitioner (Exhibits 77, 82, 83, 83(a), 83(b), 90, 91, 91(a) and 91(b)), the Hearing Examiner concluded that these steps would not yield benefits in reducing the level of new trips on Old Spencerville Road sufficient to alleviate the problem or justify their imposition.

As to reducing the size of the convenience store, Technical Staff opined that “the data points on the chart on pages 1803-1806 (for ITE Trip Generation Land Use Code 945; Gasoline/Service Station with Convenience Market) are too scattered to make the conclusion that the size (GFA) of the convenience market at a gas station would make a big difference in its trip generation.” Exhibit 91(b), with emphasis added. Based on this unrebutted evidence, the Hearing Examiner concluded that it would not be appropriate to reduce the size of the convenience store in an effort to reduce traffic volume on Old Spencerville Road.

Reducing the number of pumps would, according to the LATR Guidelines, Table A-6, p. 41, reduce the number of trips generated, but the Hearing Examiner is concerned that such a reduction in available pumps might result in back-ups at the pumps, since the extensive screening around the station will probably prevent passing vehicles from seeing how many cars are waiting at the pumps until they are already in the station. Backups at the pumps might be worse both for customers and the community. The Hearing Examiner is also not inclined to recommend reducing the number of pumps because two other stations in the area also have ten pumps each (Colesville Amoco at 13335 New Hampshire Avenue and Econoline at New Hampshire Avenue and Cape May).<sup>17</sup> A ten-pump station is therefore not out of keeping with the area.

Eliminating the car wash was another possibility considered. A car wash is certainly a non-

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<sup>17</sup> Exhibit 10, p. 2-8.



inherent characteristic of an automobile filling station use, especially in this area where Petitioner's evidence reveals that there are no carwashes connected with the nearest nine filling stations. Exhibit 10, p. 2-8. However, according to LATR Guidelines Table A-6, elimination of the car wash would make little difference, reducing the a.m. peak hour trips by about 50, and having no effect on the p.m. peak-hour traffic. Moreover, the car wash is expressly permitted as an accessory use to an auto filling station by footnote 41 to Zoning Ordinance §59-C-4.2(e),<sup>18</sup> and the fact that none of the other gas stations around have car washes means that the community need for one in the area is greater.

Since none of the steps discussed seemed to provide an appropriate remedy to the problem of new traffic volume on Old Spencerville Road, the Hearing Examiner considered other alternatives. Both Mr. Singh and Mr. Aladesuru requested that a wall be constructed by Petitioner on their side of Old Spencerville Road to block the effects of the gas station. Tr. 190 and 205. The Hearing Examiner therefore explored that idea with Technical Staff. Staff's response was that "a masonry-type wall would not appear to fit in with the rural character that the master plan recommends for this site." Exhibit 91(a). Technical Staff felt that the on-site landscaping proposed by Petitioner was sufficient, but noted that if there was to be additional screening to the east of Old Spencerville Road, "then an evergreen screen, at least three feet high, or a board on board type fence with planting materials along its base is more appropriate and is recommended." (Exhibit 91(a)).

The Hearing Examiner finds that some type of fence is necessary because none of the on-site screening will block the effects of new traffic on Old Spencerville Road. That traffic will, of course, be outside of the on-site screening. Whether one uses Technical Staff's figure of 1,528 to 1,686 new trips per day on Old Spencerville Road or Ms. Randall's figure of 2,193 new trips per day, with their

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<sup>18</sup> "41. A car wash with up to 2 bays may be allowed as an accessory use to an automobile filling station."

impact attenuated because only a percentage of the drivers will use the southeastern driveway, the fact remains that all these new trips will create an adverse impact of noise, lights and activity which can be reduced by an intervening wooden fence with planting materials along its base. Though a fence may not be the ideal solution, it appears to be the best way to reduce the impacts on the confronting neighbors without doing violence to the Master Plan's concept of a rural setting. The Hearing Examiner has proposed a condition in Part V of this report which would require such a fence to be provided by Petitioner, with the permission of the confronting landowners on whose property the fence would reside. Petitioner must also make reasonable efforts (*i.e.* certified mail) to advise the other confronting property owner, Sunny Varkey, of the fence proposal, and offer to extend the fence onto his property. The fence design should be submitted to Technical Staff, in a revised landscape plan, for review prior to submission to the Board of Appeals.

#### Traffic Safety

Some concerns were also expressed at the hearing about the safety of traffic attempting to exit Old Spencerville Road and turn left onto southbound New Hampshire Avenue. Tr. 64. Ms. Randall indicated it was not unlike any of the other situations up and down the roadway where the driver that has to wait for that accessible gap. With this particular location, there is a signalized intersection immediately to the south at New Hampshire Avenue and Spencerville Road, which will provide gaps in the flow of traffic, giving opportunities for drivers to make that left hand turn out of Old Spencerville Road. Tr. 104. Also, widening the entrance to Old Spencerville Road will allow drivers to make a right-hand turn onto New Hampshire Avenue without pressuring those waiting to make a left onto New Hampshire. Tr. 105.

Ms. Randall further testified that the State Highway Administration asked Petitioner to provide for a southbound left turn lane on New Hampshire Avenue so that there is a place for vehicles that want to turn left onto Old Spencerville Road, which will be widened to have one

inbound lane and two outbound lanes. Tr. 103. The entrance will be resurfaced and striped. The State Highway Administration will determine whether the median island on New Hampshire Avenue will be widened enough for cars to wait there while making a left onto New Hampshire. There is an adequate sight distance for both north and south to make those turning movements out of Old Spencerville Road in a safe and prudent manner. Tr. 108.

Ms. Randall further testified that the site layout is conducive to an efficient flow of traffic through the site, and the stacking space for the car wash and parking for the store are more than sufficient to make sure that cars do not stack up onto Spencerville Road (MD 198). Tr. 108-109. If somebody entered from Spencerville Road to the south, they would then proceed north along the treed area on the rendered site plan and then all the way around up near the entrance on Old Spencerville Road and then behind the convenience store and back southeast towards the entrance to the car wash, which is on its northern side, so there is ample stacking area on the site.

On cross-examination, Ms. Randall stated that she was not familiar with any major accidents that have occurred at the entrance to the New Hampshire Avenue's exit as well at the intersection of Route 198 and New Hampshire Avenue. While there may currently be unanswered safety issues, the project must still go through the permitting process, subdivision, access permits, and all of the requirements by the State Highway Administration, Park and Planning, and DPWT.

According to Ms. Randall, the service station has been designed to meet the County and the State standards, which incorporate criteria for safety and design. Ms. Randall testified that she did a pedestrian study, and that sidewalks will be provided. She concluded that the special exception will not have an adverse effect on area roadway conditions, will not create a traffic hazard or a traffic nuisance, nor adversely effect vehicular or pedestrian safety. Tr. 109-110. Transportation Planning Staff agreed, as long as the existing sidewalk along New Hampshire Avenue is replaced with a new five-foot wide sidewalk, and other conditions are met. Exhibit 49, Attachment 6. The conditions

recommended by Technical Staff in this regard have been incorporated into Part V of this report.

## 2. Parking:

The parking requirements for the special exception are based on a combination of an automobile filling station and a “retail, general” use. Zoning Ordinance §59-E-3.7 specifies the following parking spaces for these uses:

***Automobile filling station.** Two parking spaces for each car wash bay, grease bay or similar service area, and one parking space for each employee.*

***Retail, general.** Commercial establishments devoted to retail sales, merchandising or other similar use, except furniture stores, 5 parking spaces for each 1,000 gross leasable square feet. In accordance with the exception provision of Section 59-E-5.8 all storage space that exceeds 35 percent of the total gross leasable area shall be excluded in calculating the number of required parking spaces.*

Since there will be one car wash bay and a maximum of 4 employees on site at any one time, the filling station part of the operation requires 6 spaces.

There will be, at most, 1,770 square feet of leasable floor area in the convenience store building, which would require 9 spaces ( $1.77 \times 5 = 8.85$ ).<sup>19</sup> If we use the 1,770 square foot measure, the combined requirement is therefore 15 spaces (9 for the convenience store and 6 for the gas station and car wash).<sup>20</sup> Petitioner will provide 16 spaces (14 at the store and 2 at the vacuums). Exhibit 49, p. 13 and 90(j), Note 11.

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<sup>19</sup> Technical Staff originally indicated that 22 spaces were required based on a calculation of 3,250 square feet of retail space in the convenience store; however, Technical Staff also determined that the sales area should be limited to 1,770 square feet (Exhibit 49, p. 1), which the Hearing Examiner has recommended as a condition of the special exception. Petitioner’s representative, Tyler Paytas, estimated at the hearing that the sales portion would be 1800 square feet (Tr. 46), but the Hearing Examiner views that a rough figure. As noted earlier, Petitioner also modified its own estimate of patron area after the hearing, asserting that a recalculation by its engineers revealed a patron area of 1,449 square feet (Exhibit 90, p. 6, n. 1, and Exhibit 90(j), revised site plan, note 11). Petitioner therefore recalculated the required parking as being 13 spaces. Nevertheless, Petitioner will provide 16 spaces, so whichever figure for patron area is used, the number of parking spaces provided will exceed the required amount.

<sup>20</sup> Petitioner initially counted 10 spots adjacent to the gas pumps as parking spaces (in addition to the 16 spaces located elsewhere on the site), and therefore the original site plan indicated that 26 parking spaces would be provided. The Hearing Examiner questioned including the gas pump locations as parking spaces (Exhibit 87), and Petitioner’s revised site plan (Exhibit 90(j)), no longer counts those locations as parking spaces.

### 3. The Environment:

The subject property is not within a special protection area or a Primary Management Area. A Natural Resource Inventory/Forest Stand Delineation was reviewed and approved by the Technical Staff. Exhibit 13. There are no wetlands, streams or floodplains on site, and the special exception is exempt from Forest Conservation Law because the site is under 1.5 acres and there are no existing forests. Exhibit 7 and Exhibit 49, Attachment 5.

Petitioner's landscape architect, Gerald Eastridge, testified that Petitioner worked with the Department of Permitting Services (DPS), and DPS had approved a stormwater concept plan for quantity control that consists of sand filters that direct stormwater into storm retention system chambers underground. Tr. 133 and Exhibit 49, Attachment 10. The water will outfall into an existing pipe which runs underneath New Hampshire Avenue to the west, and then into the "FHA" receiving pond. Quality will be treated on site underground in that system. Tr. 133.

Some concerns were expressed by the neighbors regarding the impact of fuel spills upon the soil and the environment in general. Petitioner's agent, Tyler Paytas, testified that from an environmental perspective, Petitioner has completed phase one and phase two, in-depth, environmental studies to see what is in the soils, how previous users may have impacted those soils, and whether there is anything Petitioner needs to be concerned about from a global remediation perspective. Tr. 156

As to potential for gasoline spills, Mr. Paytas testified that prevention is his biggest focus. State-of-the-art systems are used for fuel delivery, and "they are a hundred times improved over what was previously there." Tr. 156-157. In older stations, single-wall steel tanks would corrode and leak. Today, Petitioner uses double-wall fiberglass tanks which don't corrode in the ground. They have a 30 year warranty from the manufacturer. There is constant monitoring in between the two walls of the tanks, which alert sensors in the stores, shuts down the fuel system and notifies

dispatch centers around the country. There are multiple controls that are constantly monitoring the tanks, the piping that runs to the dispensers and the dispensers themselves. The tank hole is about two times as large as what is actually needed to put the tanks in the ground, and there is a blanket inside of it which is designed to contain anything that might come out in any event or a rare event of a release. There is double-wall piping that runs to the dispensers, which have automatic shut off valves to prevent someone from leaving the nozzle in there and gas coming out of the gas tank. They all have shear valves in case someone were to hit the dispensers, there will not be gasoline leaking out onto the site.

An environmental consultant tells Petitioner what is needed to make the site environmentally friendly, and Petitioner has not had a release in over five years with the double wall system. There was an environmental release in Phoenix, Maryland, which stemmed from a single-wall tank that had corroded because it was steel. ExxonMobil system exceeds every state, county, and national requirement. Tr. 157-160.

If there is a gasoline spill above ground, at most it will be a gallon or two of gasoline. With the current system which has the sheer valves and flapper valves, if anything happens to the site, the fuel system shuts itself down and enters a containment mode where it contains everything. For a case that would happen above ground, the crew in the store is trained on an annual basis on how to address a one gallon or two gallon spill above ground. All the kits and equipment needed to do that are contained within the convenience store. There are automatic shutdown valves in the store as well as in multiple offices around the country. There are blankets that go around any type of spill that might happen. The last line of defense would be the underground treatment system. At least 99 percent of the spill would be contained before it even reached that system. The underground treatment system is a sand filter which generally handles stormwater runoff. Tr. 160-162.

According to Mr. Paytas, 85-90 percent of the car wash water that's used for each wash is

recaptured. There are underground reclamation tanks which capture the water used in the car wash, filter out the soap and chemicals, and reuse that water for car washes. The other 10 percent either evaporates out of the site or leaves the car wash in trench drains. Tr. 159.

The Hearing Examiner finds that Petitioner has satisfactorily explained all of the measures that it will take to avoid damage to the environment from potential fuel spills, and the evidence is that those methods more than meet the applicable regulations. As will be explained more fully in Part IV of this report, inherent characteristics of a special exception (*i.e.* all automobile filling stations) cannot serve as the basis for denial of a special exception application. The storage, handling and dispensing of fuel is obviously an inherent characteristic of all automobile filling stations, and there is no evidence that the subject site is any more environmentally sensitive than other sites. The risk of damage to the environment from a fuel spill is therefore an inherent adverse characteristic which cannot serve as the basis for denial of the subject application, as long as applicable regulations are followed. Following those regulations is a condition recommended in Part V of this report.

#### **F. Neighborhood Need**

An Automobile filling Station is one of the special exceptions listed in Zoning Code §59-G-1.24 that requires a determination of neighborhood need. Specifically, the section requires, as a prerequisite to granting the special exception, that the Hearing Examiner find, “from a preponderance of the evidence of record that a need exists for the proposed use to serve the population in the general neighborhood, considering the present availability of identical or similar uses to that neighborhood.”

To meet this standard, Petitioner submitted a “Needs Analysis” (Exhibit 10), completed by Thomas Flynn, an expert in market analysis. Mr. Flynn also testified at the Hearing, explaining his study (Tr. 69-90). Mr. Flynn examined the site, read the Cloverly Master Plan for the area and talked to Technical Staff. He also reviewed the demographics in the market area, including the numbers of households, household incomes, ethnic and other factors that might affect the potential demand for



need for a gas station. Mr. Flynn used data from a company called Claritas which adopts U.S. census information to the current year,<sup>21</sup> and that data is contained in his report. After determining what would be the market area for a facility of this type and reviewing all of the gas stations in the market area, the services that they provide, the hours of operation, the number of pumps and bays, and the size of their commercial convenience store areas, Mr. Flynn reached a conclusion as to community need for the facility.

Mr. Flynn summarized his conclusions: The market area generally encompasses the area within a six-minute driving distance (about 2 miles) of the site and includes nine other gas stations. With respect to the population, there are approximately 20,000 people living in this market area. It extends along New Hampshire and Spencerville Roads. It has grown by about 7 percent in just the last 10 years, and it's expected according to the County's projections to continue to grow at a rate over 5 percent faster than the national population. The average employed person in this area drives approximately 39 minutes to work, according to the census and a very significant number of the residents are actually employed, 54 percent. Since there's very little public transportation, almost all of these workers drive to work.

Almost all the nine existing stations are quite dated in their design and appearance, and several of them are severely dated (*i.e.*, they are laid out without very much convenience store space, generally just 200 to 400 square feet). In several cases there's very little room to park other than at the island itself of the station, and in a number of cases the access in front to the road that serves the station is dangerous and very poor. At least in half of the stations in this competitive market area that were built in the 60's or 70's, some in the 80's, where the designs weren't very advanced, given the volume of traffic and kind of needs in the market area. Two other stations have 10 pumps each, but none has a car wash.

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<sup>21</sup> Claritas is an international company, founded about 10-12 years ago, and is now part of a multi-national company. It uses U.S. census and other kinds of data to estimate how much retail spending potential there is a defined market area.

Mr. Flynn calculated the gap between demand for gasoline in the area and available supply to be approximately 1.3 million gallons per year. Mr. Flynn also applied the local demographic data using the Claritas model, which factors in the number of households and the spending, income and spending for households, and he concluded that there is an estimated gap in terms of the supply of gasoline service stations, and the demand for gasoline service which would result in about 2.4 million gallons per year of potential sales that were not being met in this market area. According to Mr. Flynn, that is a significant number, given that a station with ten pumps could function well on that kind of volume.

Mr. Flynn also analyzed the annual growth in the population and the resulting demand for gasoline, and he estimated that there is a demand annually for an additional 280,000 gallons of gasoline sales per year. Given that the area is growing at a significant rate, there is an annual increase in this demand, which is occurring now.

Mr. Flynn then looked at diesel sales and demand, based on models created in his own work and used in other stations, and estimated a demand for about 450,000 gallons per year that was not being met by the existing stations. He therefore finds a supportable demand for diesel sales as a specific category, in addition to gasoline.

Finally, using the Claritas information, the convenience store potential sales have been identified as 2.9 million dollars annually. This would equate to a convenience store of approximately 8,000 square feet, much larger than is planned here.

According to Mr. Flynn, his methodology is used by retailers and analysts all over the country to evaluate opportunities like this. He concluded that there is a significant unmet demand here for gasoline, diesel, and convenience store sales, which he interprets as community need. In monetary terms, 15 million dollars is the overall market gap, of which roughly 20% to 30% of the revenue (or

about \$2.9 million) would be from the convenience store.<sup>22</sup> Mr. Flynn testified that, in his professional opinion, a need exists for the proposed automobile filling station to serve the population and the general neighborhood, considering the present availability of identical or similar uses to that neighborhood.

Technical Staff agreed with Mr. Flynn's needs analysis, Exhibit 49, p. 23 and Attachment 8, and there is no contradictory evidence in the record. The Hearing Examiner therefore finds that need for the special exception has been established.

### **G. Community Response**

Letters of opposition were received from Brian D. Kotzker, Esq. for Bikram Singh (Exhibits 42 and 50); and Dr. Reginald L. Amory (Exhibit 33 and 51) on behalf of the Hampshire Greens Homeowners Association; Darnell k. Daisey (Exhibit 32); Jesse Brande (Exhibit 14); Robert E. and Carolyn C. Bergartt (Exhibit 17); and Sravant Lavu (Exhibit 18). A Petition (Exhibit 31) with 35 signatures was also filed in opposition. A summary of these opposition writings is set forth below:

1. Dr. Reginald L. Amory (Exhibit 33 and 51) for the Hampshire Greens Homeowners Association opposes the construction of this facility on the planned site at the intersection of MD 198 and New Hampshire Avenue because it poses "so many adverse challenges to the environmental, safety, transportation, security, and planning integrity of a community of 285 homes located within one-tenth of a mile of this site."
2. Brian D. Kotzker, Esq. for Bikram Singh (Exhibits 42 and 50)
  - a. Glare, noise and odors
  - b. Effect on property values
  - c. Late hours will lead to loitering along Old Spencerville Road, which abuts the Singh property
  - d. Proposed landscaping screen inadequate (5 foot wall should be required)
  - e. Possible well contamination
3. Darnell K. Daisey (Exhibit 32): Scope and size inconsistent with rural character of area
4. Jesse Brande (Exhibit 14): Use as a turnabout; light, smell and noise; 24 hour operation in residential area; size and scope does not fit residential rural area per master and general plans; will attract trucks and cars to dangerous intersection; gas and car wash spill may

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<sup>22</sup> Mr. Flynn did not attempt to establish cash flow associated with the car wash; however, he concluded that, absent any car wash at the other stations studied, there is a need for one in the market area. He stated that the fact that none of the other stations has a car wash reflects the fact that these stations were all designed in the 60's, 70's, and 80's, and car washes were not typically included at that time. According to Mr. Flynn, car washes are kind of a generator of income that is very often included now, where possible.

- impact Patuxent Watershed and drinking water; large size; ExxonMobile has a bad track record and Maryland is suing it over gas tank leaks.
5. Robert E. and Carolyn C. Berngartt (Exhibit 17): Traffic volume and danger from traffic.
  6. Sravant Lavu (Exhibit 18): Danger from traffic.
  7. Petition (Exhibit 31) with 35 signatures opposing because of environment, traffic, rural character and Master Plan.

At the hearing, four Opposition witnesses testified, confronting neighbors, Michael Aladesuru and Bikram Singh;<sup>23</sup> Dr. Reginald L. Amory, on behalf of the Hampshire Greens Homeowners Association; and Steven Szot, who lives in the Hampshire Greens community. Hampshire Greens consists of single-family homes surrounding the County-operated Hampshire Greens Golf Course. The community is located across new Hampshire Avenue, northwest of the subject site. The nearest home in the Hampshire Greens community is approximately 900 feet away from the subject site. Exhibit 49, pp. 6-7.

The Hampshire Greens Homeowners Association and other participants expressed concerns about the compatibility of proposed gas station, as well as traffic and environmental safety. The traffic volume issues on Old Spencerville Road are also a major concern of the confronting landowners, Messrs. Aladesuru and Singh. Traffic safety, traffic volume and environmental safety were all discussed in previous sections of this report, and the Hearing Examiner finds that any concerns related thereto can be managed by appropriate conditions, and with regard to traffic safety, further review at subdivision.

In some ways, the physical compatibility issue is more difficult to resolve because the station is located in a commercial zone, even though it is surrounded by residential and rural uses. After the hearing, the Hearing Examiner issued an order (Exhibit 75) directing Petitioner to further

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<sup>23</sup> Petitioner notes that Mr. Singh's property is not technically "confronting" the subject site because "it is located diagonally northeast of the subject property." Exhibit 90, p. 4. Actually, it is diagonally southeast of the subject site, across Old Spencerville Road. Whether or not it is precisely "confronting," it will be impacted by the new volume of traffic on Old Spencerville Road, and for ease of communication, references to the confronting property owners is intended to include the Singhs, and for that matter, Sunny Varkey, who did not oppose the petition, but whose property indisputably confronts the subject site, as seen on the revised site plan (Exhibit 90(j)).

address compatibility questions. As stated in that order,

. . . the Hearing Examiner's review of the record revealed that there is insufficient information for him to properly assess the compatibility of the proposed convenience store building, as presently sized, with surrounding development. No land planner testified at the hearing. The neighbors think the proposed convenience store is too large, one characterizing it as a "Walmart." Tr. 62. It's not really Walmart sized, but at 3,250 feet, it is more than 6 times larger than the next closest (in size) gas-convenience store (500 square feet), and almost 10 times as large as the average sized gas-convenience store within two miles (338 square feet). These figures are based on the nine closest stations to the site, as determined by Petitioner's market analyst, Thomas Flynn (Exhibit 10, p. 2-8). Although Petitioner's representative, Tyler Paytas, testified that the sales portion would be only 1800 square feet (Tr. 46), and Technical Staff says the sales area will be 1,770 square feet (Exhibit 49, p. 1), Petitioner's market analyst used the figure 3,250 square feet (the whole floor area of the service building) in comparing it to the nine surrounding stations. While the market analyst testified that these other stations were all of out-dated design (Tr. 77), no yard stick was presented as to the appropriate size of such a structure in a residential-rural setting, given the recommendation of the Cloverly Master Plan that any gas station on this site be designed so as to "reinforce the rural character of the area." Master Plan, pp. 20-21.

Petitioner responded with additional information and a variety of arguments (Exhibits 83,

83(a) and 83(b)), summarized bellow:

1. Technical Staff found that the proposed structures were appropriately sized and their design was consistent with the Cloverly Master Plan. This fact should be sufficient under Maryland case law.
2. An automobile filling station, with an even larger convenience store, has previously been found to be compatible in this location. In Case No. CBA-1660-A, the Technical Staff, the Planning Board and the Board of Appeals (Opinion dated August 19, 1998, Exhibit 83(a)) all found that a convenience store of 3,412 square feet of gross floor area was deemed to be compatible with the surrounding area, an area which has not changed in character (except for highway intersection improvements) since 1998.
3. The proposed automobile filling station would be smaller in size, scale and intensity of operation than would be other uses permitted by right. Using an accepted industry norm of 10,000 square feet of building area per acre of land area, approximately 12,500 square feet of commercial building area could be constructed on the subject property. That building area could be larger than the proposed convenience store of 3,250 square feet and would be deemed to be prima facie acceptable because such uses would be permitted by right in the underlying C-1 zone without the restrictions of lighting, landscaping, hours of operation, etc., imposed by a special exception. As reported in the supplemental filing by the Petitioner's traffic engineer, the automobile filling station proposed by ExxonMobil will operate at less intense levels of operation, from a traffic perspective, than many commercial uses that could be located on this property.
4. Modern gas stations are typically constructed with convenience store

buildings comparable to that proposed by the Petitioner as shown by a review of the records of the Board of Appeals for other automobile filling stations reviewed by the Board of Appeals since 2002 (Exhibit 83(b)). The convenience store proposed by the Petitioner is not extreme in its size.

5. The true test of whether the proposed use is compatible with its surroundings is determined not solely by the size of the convenience store but by conformance with criteria explicitly set forth in the Cloverly Master Plan in order to "...reinforce the rural character of New Hampshire Avenue and Spencerville Road." (Cloverly Master Plan, page 20). The Cloverly Master Plan does not provide any specific guidance concerning the size of the buildings or buildings to be constructed on this commercially-zoned property but, rather, provides that the "rural character" of the area can be ensured by design guidelines establishing limitations on building setbacks and orientation, building design, appropriate landscaping and limitations on glare and excessive lighting. Cloverly Master Plan (pages 20-21).

6. As the record in Case No. S-2699 reflects, the Petitioner made numerous design modifications to its original plan in order to address the Mater Plan criteria. The fueling area and convenience store were re-oriented to face the intersection of New Hampshire Avenue and Spencerville Road to minimize the visual impact of the buildings to vehicles traveling along adjacent public roads. The facade of the convenience store, as well as the canopy and car wash, have been specially designed to incorporate design features (e.g., clapboard siding, shingled roof, copper-capped cupola) to present a more rural character. Fencing and substantial landscaping have been proposed to provide more separation and screening from the road and to enhance the rural feel of the proposal. Finally, lighting was reduced, both in terms of the number of fixtures and the wattage of fixtures, all to make the service station more compatible and more consistent with the criteria established in the Cloverly Master Plan.

The Hearing Examiner is persuaded by these submissions, which the opposition did not refute. There is no evidence that reducing the size of the convenience store would significantly improve compatibility, and as Petitioner rightly points out, the Board of Appeals has already approved a larger convenience store building for the same site.

The convenience store (described by Mr. Zsot as a "Walmart") will operate within about 1770 square feet. That is a room about 60 feet long by 30 feet wide, which is not exactly "Wallmartian" in dimensions, if I may coin a word. This gas station is not proposed for a secluded, bucolic, residential area. Not only is it in a commercial zone, it is on the corner of two major roads, New Hampshire Avenue and Spencerville Road. It is 400 feet from the closest home and 900 feet from the Hampshire Green community. Moreover, it has been designed to be as architecturally

compatible as possible with the surrounding residential areas.

The impacts of the proposed special exception upon the neighbors must be evaluated along parameters established by the Council. This special exception (*i.e.* an automobile filling station) is permitted by the Zoning Ordinance in this zone, and the possibility of a gas station on the site was expressly recognized in the Cloverly Master Plan (pages 20 & 21), even though the site is surrounded by residential uses. It therefore must have been anticipated by the Council that there would ordinarily be some impacts on nearby residents. Thus, the fact that there are such nearby residences and they will be impacted cannot, in and of itself, defeat the petition.

Land use policymakers (*i.e.*, the Council) must engage in a kind of balancing act, weighing the right of a property owner to do what it wants to do with its private property against the needs of the neighbors not to have significant adverse impacts upon their properties. The policy makers must simultaneously consider the public interest in having some necessary facilities available in residential areas. This balancing act is accomplished through the Zoning Ordinance, which sets the parameters within which land uses are permitted. The Council has determined that this type of special exception is permitted, even though it will potentially have some adverse effects on the neighbors regardless of where it is located within the zone. The case law is quite clear that where a use is permitted by the Zoning Ordinance under a special exception, that use may not be denied if the only adverse effects it produces are those which are inherent in the nature of the special exception. As stated in *Schultz. v. Pritts*, 291 Md. 1, 22-23; 432 A.2d 1319, 1331(1981),

We now hold that the appropriate standard to be used in determining whether a requested special exception use would have an adverse effect and, therefore, should be denied is whether there are facts and circumstances that show that the particular use proposed at the particular location proposed would have any adverse effects **above and beyond** those inherently associated with such a special exception use irrespective of its location within the zone. [Emphasis added.]

Wherever it is located, such a facility will likely be visible to some extent; it will produce

some traffic and it will produce some noise and activity. In the subject case, the impact of the activity it may produce is ameliorated by the fact that the facility will front on two major roads, New Hampshire Avenue and Old Spencerville Road. Moreover, the proposed facility will meet all the required setbacks, will be architecturally designed to be compatible, will be well screened, and will provide much more green area than is required (10% is required by Zoning Ordinance §59-C-4.344, and about 40% will be provided). In addition, conditions will be imposed, as mentioned, to alleviate significant adverse impacts.

Thus, the standards established in the Zoning Ordinance to protect the neighbors against adverse impacts from this kind of facility will be met in this case. The decision on a zoning application “is not a plebiscite,” and generalized fears in the community cannot overcome actual evidence. *Rockville Fuel v. Board of Appeals*, 257 Md. 183, 192, 262 A.2d 499, 504 (1970). It is not the Hearing Examiner’s function to determine which position is more popular, but rather to assess the Petitioner’s proposal against the specific criteria established by the Zoning Ordinance.

In sum, although neighbors in opposition have raised some legitimate concerns, they do not warrant denial of the subject petition. They do warrant the imposition of special conditions which have been discussed in order to limit any potentially adverse consequences.

### **III. SUMMARY OF THE HEARING**

Petitioner called four witnesses at the hearing, Tyler Paytas, project manager for CB Richard Ellis, a real estate consultant for ExxonMobil; Thomas Flynn, an expert in market and needs analysis; Anne (Nancy) M. Randall, an expert in traffic planning and engineering; and Gerald Eastridge, an expert in landscape architecture. Four Opposition witnesses also testified – confronting neighbors, Michael Aladesuru and Bikram Singh, Dr. Reginald L. Amory, who testified on behalf of the Hampshire Greens Homeowners Association, and Steven Szot, who lives in the nearby Hampshire Greens community.



At the outset of the hearing, Petitioner's attorney, Jody Kline, Esquire, noted that subdivision would be required in this case because the site consists of different parcels assembled by Petitioner. Minor corrections will be needed in the plans to accurately show the floor area of the service building (3,250 square feet). Mr. Kline also mentioned that there is a small area of County-owned property (Parcel 972), adjacent to (and southeast of) the subject site.

Mr. Kline indicated that there has been a gas station at this property for a long time, and the original gas station special exception was awarded to a different party in 1964. When Exxon developed an interest in this area in the mid 1990's, it obtained a special exception for the gas station, with no car wash or repair bays, on part of the subject site. That special exception "just kind of sat on the shelf for a long time and eventually expired because Exxon decided not to go forward." Tr. 15. More recently, Exxon went out and acquired the additional land, put it under contract, and expanded the scope of the special exception to include a car wash.

#### **A. Petitioner's Case**

##### 1. Tyler Paytas (Tr. 18-60; 155-163):

Tyler Paytas testified that he is the project manager for CB Richard Ellis who provides full real estate consulting services for ExxonMobil. He permits, designs and entitles new gas stations, demolish and rebuild projects, does renovations and tank replacements. He is handling 150 ExxonMobil stations along the East coast and is the authorized spokesman for ExxonMobil.

Petitioner is proposing a convenience store, automobile filling area, and fully automated car wash at a 45 degree angle to New Hampshire Avenue and Spencerville Road. There would be five dispensers, with a total of ten fueling positions on both sides of the dispenser. One of the five dispensers is capable of dispensing both gas and diesel. Petitioner rotated the convenience store layout and fueling positions 45 degrees from the intersection, rather than facing directly on New Hampshire Avenue to minimize visual impact onto New Hampshire and to prevent any glare or

lighting spillover into the community.

Mr. Paytas used a rendered site plan (Exhibit 54), rendered elevations (Exhibits 55, 56 and 57) and a “Conceptual Site Perspective” (Exhibit 58) to demonstrate that Exxon was using its highest quality architectural design to make this gas station compatible. Features include hip roofs with asphalt shingles (on the canopy, as well as on the other structures), clapboard siding, mullions in the windows, and a cupola on the service building to give the structures a more residential, rural look. Even the trash enclosure will be wrapped in the same material as the convenience store, car wash, and canopy with the clapboard siding to match. The lighting is designed to shield light and glare and direct it to prevent spillover. When the station is completely closed, there will be some lighting under the canopy just for safety and a few of the bollard lights around the property, but the main area lights will be turned off. Instead of the usual Exxon Pylon sign, there will be a ground mount monument sign on the south property line near the right-in access from Spencerville Road. The other monument sign is located along New Hampshire Avenue.

According to Mr. Paytas, there will be a maximum of 3 or 4 employees on a shift, with a total of seven employees possibly present during shift changes. The car wash is fully automated. Though Exxon usually seeks 24 hour operations, the hours of operation of the automobile filling station and the convenience store would be from 5:00 a.m. to 12:00 midnight and that of the car wash from 8:00 a.m. to 9:00 p.m. The level of activity associated with this station would be less than a typical gas station.

Mr. Paytas testified, based on his familiarity of the operation of automobile filling stations, there will be no objectionable noise, lights, activity or other adverse effects on any surrounding property owners or anyone traveling past the site. Newer stations are ten times more improved over stations that were built ten years ago. Petitioner uses state-of-the-art fuel delivery systems which have stage two vapor recovery to capture fumes both when it is being unloaded from the truck into

the new fuel storage and when it's being dispensed. There will be reduced lighting problem, reduced hours of operation and enhanced landscaping to prevent light and glare from leaving the property.

On cross-examination, Mr. Paytas testified that there will be a deceleration lane along Spencerville Road, with a right-in only to the property (at the southern end). There will no exit at this point. There will be full ingress and egress access at two points along Old Spencerville Road (on the east side of the property). The convenience store will be 20 feet and the canopy will be 22 feet. The HVAC equipment will be behind the mechanical enclosure shown on the rear elevation, centered in the middle of the building. It is open on top, but Exxon utilizes brand new equipment which has very low decibel levels, ranging from 40-50 decibels directly within two feet of the equipment. It would not exceed the county noise level maximums. As to the car wash, inside a 20 foot radius, it is about 60 decibels, but outside of the 20 foot radius, it drops below the ambient noise level of the site generated by New Hampshire Avenue and Spencerville Road.

Deliveries for the convenience store will be made on its east side, through the front entrance. The convenience store occupies 1800 square feet of the 3250 square foot service building. The rest is storage and rest rooms.

The trees shown as screening on the conceptual site perspective (Exhibit 58) are shown at three years maturity. Petitioner can't screen to the northeast side of Old Spencerville Road because it doesn't control that area, but it will screen on the northeast side of its own property with trees. There is no screening wall planned. Vacuum cleaners will be located on the Northwest corner of exhibit 54. The gas delivery truck is it going to come in through the Old Spencerville, and will arrive at the site about 11:00 a.m. or 12:00 noon every 48 hours, or so, and a late delivery might be made if the station were about to run out, but that is not the plan. Bread deliveries are typically made around 6:00 or 7:00 in the morning.

On cross-examination, Mr. Paytas testified that from an environmental perspective, Petitioner

has completed phase one and phase two in-depth environmental studies to see what is in the soils, how previous users may have impacted those soils, and whether there is anything Petitioner needs to be concerned about from a global remediation perspective.

As to potential for gasoline spills, Mr. Paytas testified that prevention is his biggest focus. State-of-the-art systems are used for fuel delivery, and “they are a hundred times improved over what was previously there.” Tr. 156. In older stations, single-wall steel tanks would corrode and leak. Today Petitioner uses double-wall fiberglass tanks which don't corrode in the ground. They have a 30 year warranty from the manufacturer. There is constant monitoring in between the two walls of the tanks, which alert sensors in the stores, shuts down the fuel system and notifies dispatch centers around the country. There are multiple controls that are constantly monitoring the tanks, the piping that runs to the dispensers and the dispensers themselves. The tank hole is about two times as large as what is actually needed to put the tanks in the ground, and there is a blanket inside of it which is designed to contain anything that might come out in any event or a rare event of a release. There is double wall piping that runs to the dispensers, which have automatic shut off valves to prevent someone from leaving the nozzle in there and gas coming out of the gas tank. They all have shear valves in case someone were to hit the dispensers, there will not be gasoline leaking out onto the site.

An environmental consultant basically tells Petitioner what is needed to make the site environmentally friendly. Petitioner has not had a release in over five years with the double wall system. There was an environmental release in Phoenix, Maryland, which stemmed from a single wall tank that had corroded because it was steel. ExxonMobil system exceeds every state, county, and national requirement.

If there is a gasoline spill above ground, at most it will be a gallon or two of gasoline. With the current system which has the sheer valves and flapper valves, if anything happens to the site, the

fuel system shuts itself down and enters a containment mode where it contains everything. For a case that would happen above ground, the crew in the store is trained on an annual basis on how to address a one gallon or two gallon spill above ground. All the kits and equipment needed to do that are contained within the convenience store. There are automatic shutdown valves in the store as well as in multiple offices around the country. There are blankets that go around any type of spill that might happen. The last line of defense would be the underground treatment system. At least 99 percent of the spill would be contained before it even reached that system. The underground treatment system is a sand filter which generally handles stormwater runoff.

According to Mr. Paytas, 85-90 percent of the car wash water that's used for each wash is recaptured. There are underground reclamation tanks which capture the water used in the car wash, filter out the soap and chemicals, and reuse that water for car washes. The other 10 percent either evaporates out of the site or leaves the car wash in trench drains.

2. Thomas Flynn (Tr. 69-90):

Thomas Flynn testified as an expert in market analysis. He evaluated the community need for the station, including the sale of gasoline, diesel fuel, and the convenience commercial component. He examined the site, read the Cloverly Master Plan for the area and talked to Technical Staff. He also reviewed the demographics in the market area, that is the population in terms of numbers of households, of parents with respect to driving, the household income, ethnic and other factors that might affect the potential demand for need for a station like this. Mr. Flynn used data from a company called Claritas which adopts U.S. census information to the current year,<sup>24</sup> and that data is contained in his report. After determining what would be the market area for a facility of this type and reviewing all of the gas stations in the market area, the services that they provide, the hours of

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<sup>24</sup> Claritas is an international company. It was founded about 10-12 years ago, and is now part of a multi-national company. It uses U.S. census and other kinds of data to estimate how much retail spending potential there is a defined market area.

operation, the number of pumps and bays, and the size of their commercial convenience store areas, Mr. Flynn reaches a conclusion as to community need for the facility.

Mr. Flynn summarized his conclusions: The market area generally encompasses the area within a six-minute driving distance (about 2 miles) of the site and includes nine other gas stations. With respect to the population, there are approximately 20,000 people living in this market area. It extends along New Hampshire and Spencerville Roads. It has grown by about 7 percent in just the last 10 years, and it's expected according to the County's projections to continue to grow at a rate over 5 percent faster than the national population.

Some of the key facts about the population are: the average household income is over \$90,000; it is a fast growing area with fairly expensive homes; the majority population is Caucasian, and that's about 60 percent; there are significant minorities of African American and Asian populations (each about 16-17 percent); and there is a small Latin population. The average employed person in this area drives approximately 39 minutes to work, according to the census and a very significant number of the residents are actually employed, 54 percent. Since there's very little public transportation, almost all of these workers drive to work.

Almost all the nine stations are quite dated in their design and appearance, and several of them are severely dated (*i.e.*, they are laid out without very much convenience store space, and in any case, they are just 200 to 400 square feet, which is a very small amount of space for convenience to any gas station. In several cases there's very little room to park other than at the island itself of the station, and in a number of cases the access in front to the road that serves the station is dangerous and very poor. At least in half of the stations in this competitive market area that were built in the 60's or 70's, some in the 80's, where the designs weren't very contemporary or very advanced given the volume of traffic and kind of needs in the market area. Two other stations have 10 pumps each, but none has a car wash.

Applying a retail model based on Claritas data that factors in the number of households and the spending, income and spending for households, Mr. Flynn concluded that there is an estimated gap in terms of the supply of gasoline service stations, and the demand for gasoline service which would result in an estimate of 2.4 million gallons per year of potential sales that were not being met in this market area of population. According to Mr. Flynn, that is a significant number given that a station with ten pumps could function well on that kind of volume.

Mr. Flynn also analyzed the annual growth in the population and the resulting demand for gasoline and estimated that there is a demand annually for an additional 280,000 gallons of gasoline sales per year. Given that the area is growing at a significant rate, there is an annual increase in this demand, and that's occurring now.

Mr. Flynn then looked at diesel sales and demand, based on models created in his own work and used in other stations, and estimated a demand for about 450,000 gallons per year that was not being met by the existing stations. He therefore finds a supportable demand for diesel sales as a specific category, in addition to gasoline.

Finally, using the Claritas information, the convenience store potential sales have been identified as 2.9 million dollars annually. This would equate to a convenience store of approximately 8,000 square feet, much larger than is planned here.

According to Mr. Flynn, his methodology is used by retailers and analysts all over the country to evaluate opportunities like this. He concluded that there is a significant unmet demand here for gasoline, diesel, and convenience store sales, which he interprets as community need. In monetary terms, 15 million dollars is the overall market gap, of which roughly 20% to 30% of the revenue would be from the convenience store.

Mr. Flynn testified that Technical Staff agreed with his analysis, and it is his professional conclusion that a need exists for the proposed automobile filling station to serve the population and

the general neighborhood considering the present availability of identical or similar uses to that neighborhood.

The Hampshire Green community was included in his market analysis. There are three factors determining unmet demand. One is population. The second is the employment base within an area which is not very great in this case. And the third is traffic at an intersection. All of these factors relate to the need for gasoline and a store operation like this. The population is really the key one in this case and that's what generated this community need. There is also significant traffic, and it is an important corner. One of the factors in the analysis is how many people are working in an area and would buy gasoline close to home and how many people are passing through an area and buy gasoline on a trip. All those factors come into the model that was used.

The fact that none of the other stations has a car wash reflects the fact that these stations were all designed in the 60's, 70's, and 80's, and that was not something that was typically done at that time. Car washes are kind of a generator of income that is very often included now, where possible. Mr. Flynn concluded that, absent any car wash at the other stations, there is a need for one, although he didn't try to describe cash flow associated with it. [Mr. Kline opined that the requirement in the Zoning Ordinance to show need should be read as a package, including the car wash. *i.e.*, no separate demonstration of need for a car wash is required.]

3. Anne (Nancy) M. Randall (Tr. 91-117):

Nancy Randall testified as an expert in traffic planning and engineering, and prepared a traffic impact analysis for the proposed use. At the beginning of any project, she meets with Technical Staff to scope out the body of work that's going to be required for the traffic impact study. Staff specifies the numbers of intersections that need to be addressed, the basis for the directional distribution of the site traffic, the background development, and the approved projects that are in the pipeline but have not yet been constructed or fully occupied. All of the parameters that go into a traffic impact study



are first discussed and vetted with Park and Planning staff. In addition, the State Highway Administration is often brought in as well through that process.

After meeting with and getting an agreed-upon scope of work for this project, she looked at seven different intersections. It's Norwood Road and Norbeck Road extended, New Hampshire Avenue and Spencerville Road and Norbeck Road extended, Spencerville and Good Hope Road, New Hampshire Avenue and Ednor Road, New Hampshire Avenue and Old Spencerville Road, New Hampshire Avenue and the site access point, and New Hampshire Avenue and Briggs Chaney.

At one time, access was planned directly onto New Hampshire Avenue, but after that was analyzed, the State Highway Administration, Park and Planning staff and DPW&T determined that the New Hampshire Avenue access point should be eliminated. The State Highway Administration recommended access directly off of MD Route 198 to Spencerville Road as shown on the current plan.

Ms. Randall provided an addendum to the original report addressing this one change in the access. The second report really only affects the original site access which is now closed, and the proposed new intersection as its pulling traffic off before it even gets to the intersection of Spencerville and New Hampshire. There will be a change in the volume at Old Spencerville and New Hampshire Avenue, but the outlying intersections beyond the immediate site remain unchanged.

Data was collected from 6:30 to 9:30 in the morning during the weekday and then from 4:00 to 7:00 in the evening. Those are the peak periods, and then the highest one hour is pulled from that three hour window, so it could be, at any given intersection, 7:15 to 8:15 or 6:30 to 7:30. Then, in addition to looking at and analyzing the existing conditions in accordance with Park and Planning and State Highway Administration guidelines, Ms. Randall added in the anticipated developments that are the seven pipeline projects provided by Park and Planning.

Those seven projects were going to generate an additional 181 peak hour trips in the a.m. and

147 in the p.m. peak hour. In accordance with Park and Planning distribution requirements, those trips were assigned to each one of the intersections to determine background conditions.

The site itself was then analyzed. This particular filling station, with ten pumping positions, would generate a total of 173 a.m. peak hour trips and 218 p.m. peak hour trips. This is based on the Park and Planning trip generation guidelines for filling stations with car wash and convenience store. A portion of those trips are “pass-bys,” pulled from the existing traffic stream – sixty percent in the morning and sixty percent in the evening, according to Park and Planning guidelines.

Thus, of the total of 173 total coming in and out of the site, 104 are pass-bys in the morning, and in the evening 109 are pass-bys, so the new trips to the area road system would be 69 in the morning and 109 in the evening. Again, those trips were assigned to the area road system through the network of all the different intersections being analyzed.

Ms Randall testified that the Cloverly Policy Area has sufficient capacity, so there are no Policy Area Mobility Review (PAMR) requirements for the Cloverly area, which has a congestion standard of 1475 critical lane volume (CLV). All of the studied intersections are operating within that standard and will continue to do so when background and newly generated trips from the proposal are counted in. She concluded that the proposal not only meets the current regulations but also meets the new regulations relating to traffic impact. The modifications to the site access do not change the overall distribution of traffic, how far it's going and what direction it eventually ends up, just how it exits or enters the site. Under the revised analysis, all of the intersections operate at acceptable levels of service and all are well within the 1475 CLV.

[The Hearing Examiner mentioned that PAMR was adopted by the Council as part of the new Growth Policy in November of 2007, but on the day of the hearing, the Council passed a Zoning Text Amendment which says that for special exceptions filed before PAMR was adopted, the new policy standards will not apply. However this special exception also has to go through subdivision, and the

PAMR requirements will presumably apply at subdivision.]

Ms. Randall indicated that the State Highway Administration asked Petitioner to provide for a southbound left turn lane on New Hampshire Avenue so that there is a place for vehicles that want to turn left onto Old Spencerville Road, which will be widened to have one inbound lane and two outbound lanes. The entrance will be resurfaced and striped.

As to Mr. Szot's point about difficulty in making a left turn onto New Hampshire Avenue from Old Spencerville Road, Ms. Randall indicated it was not unlike any of the other situations up and down the roadway where the driver has to wait for that accessible gap. With this particular location, there is a signalized intersection immediately to the south at New Hampshire Avenue and Spencerville Road which will provide gaps in the flow of traffic, giving opportunities for drivers to make that left hand turn out of Old Spencerville Road. One of the reasons why the entrance to Old Spencerville Road is being widened was to make sure that the person who is behind somebody choosing to make a left hand turn, can make a right. Often, when somebody is pressured from behind, they'll take a chance that they would otherwise not be comfortable with, and by providing for that two-lane outbound on Old Spencerville Road, the person who is making the right turn only has to be concerned about the northbound flow. The State Highway Administration will determine whether the median island on New Hampshire Avenue will be widened enough for cars to wait there while making a left onto New Hampshire. There is an adequate sight distance for both north and south to make those turning movements out of Old Spencerville Road in a safe and prudent manner.

Ms. Randall further testified that the site layout is conducive to an efficient flow of traffic through the site, and the stacking space for the car wash and parking for the store are more than sufficient to make sure that cars don't stack up onto Spencerville Road (MD 198). If somebody entered from Spencerville Road to the south, they would then proceed north along the treed area on the rendered site plan and then all the way around up near the entrance on Old Spencerville Road and

then behind the convenience store and back southeast towards the entrance to the car wash, which is on its northern side, so there is ample stacking area on the site.

In Ms. Randall's opinion, the use would not create a traffic hazard or a traffic nuisance. She also opined that the site would be safe for pedestrian and vehicular traffic.

On cross-examination, Ms. Randall stated that she was not familiar with any major accidents that have occurred at the entrance to the New Hampshire Avenue's exit as well at the intersection of Route 198 and New Hampshire Avenue. While there may currently be unanswered safety issues, the project must still go through the permitting process, subdivision, access permits, and all of the requirements by the State Highway Administration, Park and Planning, and DPW&T. All of their standards and all of those requirements will be met.

Ms. Randall indicated that she had not considered the impact on volume from lowered gasoline prices as a promotion because she is required to apply trip generation rates supplied by the Maryland-National Capital Park and Planning Commission. The uses of the gas station, the convenience store and the car wash are all wrapped up in those trip generation rates. Traffic counts were done in January and February.

According to Ms. Randall, the service station has been designed to meet the County and the State standards, which incorporate criteria for safety and design. Ms. Randall further testified that she also did a pedestrian study. Part of the pedestrian study is to make sure that sidewalks are provided.

4. Gerald Eastridge (Tr. 118-155):

Gerald Eastridge testified as an expert in landscape architecture. He described the site and its topography. Water on the site drains to the south and west. The southeastern corner of the site (across from Mr. Aladesuru's property) is 10 feet higher than in front of the proposed convenience store.

The requirement for perimeter planting around the site is one tree per 40 foot. Petitioner will plant a variety of trees in terms of appearance and texture and color to provide a buffer for individual screening from the outside of the site looking into it. In Mr. Eastridge's opinion, the plantings will have an aesthetically pleasing natural appearance, and will be an effective screen, particularly as the plants mature. The shade trees will be 3.5 inches in caliper, which is about 14-16 feet in height. So, they are sizable trees. Petitioner's exhibits show them at eight years after planting. In addition to the required buffer, Petitioner also will provide understory planting – a mixture of evergreens, some deciduous, but, mostly evergreen shrubbery, and some of them are three to four foot in height. There will be a good mix of plants that would provide an attractive foundation, not only for entering into the site but also for screening the cars that will be moving through the site from the outside to provide a more residential appearance. Because of the convenience store will be lower than properties to the east, it would be very difficult for someone say 300 foot away to see more than portions of the roof of the building over the screening. The screening will therefore be very effective.

Using an aerial photograph (Exhibit 62) and the Zoning Map (Exhibit 64), Mr. Eastridge estimated distances from the property line to the nearest homes: 180 feet across Spencerville Road to unidentified structures, to the south; 400 feet to Mr. Aladesuru's house to the east; 600 feet to Mr. Singh's house to the east; and 850 feet to Hampshire Green homes to the northwest.

Mr. Eastridge testified that Petitioner worked with DPS staff, and they've given approval for stormwater concept plan for quantity control that consists of sand filters that direct stormwater into storm retention system chambers underground. The water will outfall into an existing pipe which runs underneath New Hampshire to the west, and then into the "FHA" receiving pond. Quality will be treated on site underground in that system.

Petitioner did a natural resources inventory and received a letter of waiver essentially because the site is under 1.5 acres and there were no forests on site. There was no need for afforestation after

the development because of that. That's in the record as exhibit 7.

Petitioner has been working with WSSC on sewer and water classification. The site has both public water and sewer access, and WSSC indicates it is acceptable so Petitioner can make the connection.

Mr. Eastridge's office hired a professional lighting designer who developed a lighting plan for the property and a photometric analysis. [He initially stated that the photometric analysis in the record satisfies the county requirements for 0.1 foot candles at property lines, but closer examination of the photometric plan revealed areas where it exceeded that standard, and Petitioner will submit a revised lighting plan.]

Mr. Eastridge testified that the proposed station was designed to satisfy all the requirements of the Montgomery County zoning ordinance for both the zone itself and the specifications for an automobile filling station. It will not impact on the environment or surrounding properties differently than other automobile filling stations he has designed.

On cross-examination, Mr. Eastridge was unable to answer how a gasoline spill would be handled. He indicated that the trees would be 14-16 feet tall when planted, with a spread of probably 8-10 feet. Petitioner intended to plan deciduous trees, but would consider filing a revised landscape plan with a mix of deciduous and evergreen trees. Considering the distance to the homes and the landscaping with a mix of evergreens and deciduous, Mr. Eastridge does not feel that a screening wall would be necessary or make a difference.

Mr. Eastridge was unable to answer what effect if any the gas station would have on nearby property values.

## **B. Opposition Testimony**

### 1. Steven Szot (Tr. 61- 68)

Steven Szot testified that he lives at 16604 Sea Island Court in the Hampshire Greens

community, located to the west of the subject site. He has three concerns: the environment, the traffic intersection and the size and scope of this project. In his opinion, unlike the prior 1964 station which only had four pumps and no food service, the proposed station is “more of a WalMart than what is currently in our surrounding business district area.” Tr. 62.

Environmentally, he is concerned because this facility is adjacent to the Patuxent watershed, which is a protected wetland. He fears that any type of spill or tank leakage may damage the environment, including nearby well water. According to Mr. Szot, in 2006 a new Exxon site in the Jacksonville area of Baltimore County had a tank leakage, and there were 27 sensors that didn't pick it up. Right now the State of Maryland is suing Exxon Mobil over that tank leakage and it's a brand new facility. They didn't find the leaks. Mr. Szot noted that it is a residential area, and even though the site is zoned commercial, any type of spill would be detrimental to the community. If there were runoff from the subject site, it may contaminate the tributaries and streams that run through his community.

There is also an equestrian center across the street on the northeast side where the current Old Spencerville Road is. Mr. Szot stated that the noise from this facility may affect the horses and the training of children that ride the horses on that facility. Directly across Spencerville Road, there was a child care center, but it has recently ceased operation.

Mr. Szot's second point relates to traffic. Automobiles exiting the facility off Old Spencerville Road in an effort to proceed southbound have to cross several lanes of traffic at New Hampshire Avenue, which is very busy. There is no traffic control device other than a median and a turn lane. There isn't enough room for a car to cross the northbound lane of New Hampshire Avenue and wait for traffic to clear if they wanted to go southbound on New Hampshire Avenue.

Mr. Szot also objects to the size and scope of this project. There currently are two gas stations the business area of Cloverly, a Citgo that has four islands or eight pumps and a low priced

gas station with two islands and four pumps. Those are in the business district and not in a residential area. This proposal is for five islands, with ten pumps, a car wash and an “eatery,” and he feels that is excessive and out of scope for the rural character of the area. In his opinion, it should be constructed in a business district or near the ICC. Reducing the number of pumps to eight would be a step in the right direction. There's nothing in the area that is comparable in size to this. It is out of place in an area that's primarily residential, even though the Cloverly Master Plan presupposes a gas station would be there and doesn't constrain its size. It does say it should conform to the rural look and character of the area, and in his opinion, that goes to the size and scope of this facility, which includes selling food, vacuum services, and car wash services. The objection is not to the fact that there will be a gas station, it is to its size and the fact that it includes a car wash and a convenience store, and poses potential environmental and traffic issues.

2. Dr. Reginald Amory on behalf of Hampshire Greens Homeowners Association (Tr. 163-187):

Dr. Reginald Amory testified on behalf of the Hampshire Greens Homeowners Association, and he is a homeowner in that community, living at 702 Indian Wells Court. His testimony is summarized in Exhibit 66.

Dr. Amory testified that the Hampshire Greens community has 286 homes and a net worth of about 200 million dollars. He observed that the nature of Hampshire Greens has a tremendous effect on the fact that a gas station (rather than some other form of transportation support) is being located nearby, but the station's existence would have negative effects. Hampshire Greens has concerns about the scale of the proposal, the car wash, the convenience store, the potential for gasoline spills, problems with egress from the station, and with safety. Exxon has not sufficiently considered impacts on the surrounding community.

Dr. Amory challenged the need for the station, noting that “in talking to at least one gas



station owner he's pumping gas only at three-quarters of what his capacity is and he's had to cut back on his hours because he's not pumping nearly as much gas as he could pump.” Tr. 165. That station is three-tenths of a mile away on New Hampshire Avenue. [The Hearing Examiner noted that this was hearsay evidence from a potentially biased source, a competitor of Exxon.]

Dr. Amory further testified that the intersection of Route 198 and New Hampshire Avenue is dangerous, and there were two major accidents in the last few years on that corner, one resulting in a fatality. In his opinion, Petitioner did not really address the fact that the traffic is going to go into a two-lane highway. The amount of traffic is also a problem, which will be made worse by adding this “oversized” facility. He felt the gas station should be located closer to the Inter-county Connector. [The Hearing Examiner noted that the traffic issues will be reviewed in more detail at subdivision before the Planning Board, where the public can participate.]

Dr. Amory also feels that Petitioner has not sufficiently addressed the issue of potential gasoline spills. He consulted “the foremost authority in the world on land subsidence and ground water hydraulics, Dr. Donald C. Helms, . . . [who indicated that] special attention should be directed towards studying its geological hydrological conditions at this particular site to determine the possibility for gas leakage that could get into the aquifers.” Tr. 171-172. [The Hearing Examiner noted that Dr. Helm’s purported statement was hearsay expert evidence, and the witness was not being made available for cross-examination. It would be allowed in only because Petitioner did not object.] Dr. Amory is concerned about what would happen if a spill got into the aquifer, and he wants the issue studied. Because the hearing date was postponed, Dr. Amory felt the community was lulled into not getting further analysis done, even though numerous notices of the new hearing date were received.

Dr. Amory also questioned whether the proposal is consistent with the Cloverly Master Plan. It is a matter of degree, and in his opinion it doesn’t comply because of the magnitude of the

planned development and the nature of the community. This is a special case because of the surrounding residential community. It's the size and scope of this effort that creates the problem. It is three times as large as the original gas station site.

Dr. Amory characterized Petitioner's agreement to cut back on the hours of operation as a cosmetic change because there is a 7-11 down the street which is open 24/7, and a nearby Safeway which is open until 11:00 or 12:00 at night, and opens at 6:00 in the morning.

Dr. Amory expressed concern about the amount of traffic which is magnified by the fact that the road narrows from four lanes to two, creating a bottleneck which may force traffic to cut through his community. The traffic coming through his community creates a potential for safety and security issues. Safeway, which is three-tenths of a mile down the road, had a project somewhat similar to this one denied. Another car wash is potentially going to be put two miles above the site on New Hampshire Avenue at Route 108. He considers this disadvantageous because it is transforming it from a rural community.

In sum, the size and scope of this project will have a combination effect on the environment, transportation, safety, security, and planning.

3. Bikram<sup>25</sup> Singh (Tr. 188-196):

Bikram Singh testified that he lives at 1131 Parrs Ridge Drive with his wife and three children. The back of his property abuts Old Spencerville Road, across from (and to the southeast of) the subject site. Tr. 17. His next-door neighbor is Mr. Aladesuru, and his property runs all the way down to the cul de sac on Old Spencerville Road.

Mr. Singh's concern is for the security of his children, who play in his back yard. Someone came through that back yard last year and broke into his cars. He fears the gas station may bring "bad people," and he wants a privacy wall, erected on his side of Old Spencerville Road, to protect

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<sup>25</sup> Mr. Singh's first name was identified by his attorney's letters as "Bickram" (Exhibits 42, 50 and 72). At the hearing, the transcriber reports his first name as "Ricky" (Tr. 4) and "Sadvir" (Tr. 188).

his property and screen out headlights from the gas station. [Petitioner's attorney indicated that Petitioner would need the neighbor's permission to go on their property and erect any type of screening.]

Mr. Singh's attorney, Brain Kotzker, pointed out that traffic on Old Spencerville Road will significantly increase if the gas station is built because it will supply the main ingress/egress of the station. This increased traffic will affect the houses that are directly behind it from the noise and/or headlights.

4. Michael Aladesuru (Tr. 196-205):

Michael Aladesuru testified that he owns the property and lives at 1127 Parrs Ridge Drive. Four years ago when he and his wife discovered this property, it was a rural area, a very quiet neighborhood. He made a decision to build a property there because he has three children and he wanted them to be able to play outside the yard. He knew the site was commercially zoned and that there was an old gas station there that was abandoned, so there was a chance that another gas station would come there, but he did not anticipate anything of this magnitude or he would not have invested his money in that property.

Mr. Aladesuru's biggest concern is safety. In the wintertime, he can see straight through to the abandoned station from his house. He has concerns about his children playing in the backyard without supervision because by putting a car wash there, more traffic will come in and see the expensive homes. It will increase break-ins and the like.

Mr. Aladesuru is also concerned about noise, especially from the car wash. This is the magnitude of a truck stop right in the middle of a residential area that has high-value homes. Also, nobody can guarantee there's not going to be a spillage.

Mr. Aladesuru stated that he is not against a gas station, but he wasn't expecting a ten-pump gas station with a car wash.

In response to the Hearing Examiner's question of whether he would be agreeable to have Petitioner place additional landscaping on his land, Mr. Aladesuru stated that he was open to it, depending on what it was. [Mr. Kline indicated that Petitioner would consider that.] Mr. Aladesuru added that the screening should be a concrete wall, which would have to continue all the way to shield Mr. Singh's property as well.

#### **IV. FINDINGS AND CONCLUSIONS**

A special exception is a zoning device that authorizes certain uses provided that pre-set legislative standards are met, that the use conforms to the applicable master plan, and that it is compatible with the existing neighborhood. Each special exception petition is evaluated in a site-specific context because a given special exception might be appropriate in some locations but not in others. The zoning statute establishes both general and specific standards for special exceptions, and the Petitioner has the burden of proof to show that the proposed use satisfies all applicable general and specific standards. Weighing all the testimony and evidence of record under a "preponderance of the evidence" standard (Zoning Code §59-G-1.21(a)), the Hearing Examiner concludes that the instant petition meets the general and specific requirements for the proposed use, as long as Petitioner complies with the conditions set forth in Part V, below.

##### **A. Standard for Evaluation**

The standard for evaluation prescribed in Zoning Code § 59-G-1.2.1 requires consideration of the inherent and non-inherent adverse effects on nearby properties and the general neighborhood from the proposed use at the proposed location. Inherent adverse effects are "the physical and operational characteristics necessarily associated with the particular use, regardless of its physical size or scale of operations." Code § 59-G-1.2.1. Inherent adverse effects, alone, are not a sufficient basis for denial of a special exception. Non-inherent adverse effects are "physical and operational characteristics not necessarily associated with the particular use, or adverse effects created by

unusual characteristics of the site.” *Id.* Non-inherent adverse effects, alone or in conjunction with inherent effects, are a sufficient basis to deny a special exception.

Technical Staff have identified seven characteristics to consider in analyzing inherent and non-inherent effects: size, scale, scope, light, noise, traffic and environment. For the instant case, analysis of inherent and non-inherent adverse effects must establish what physical and operational characteristics are necessarily associated with an Automobile Filling Station use. Characteristics of the proposed Automobile Filling Station use that are consistent with the “necessarily associated” characteristics of Automobile Filling Station uses will be considered inherent adverse effects, while those characteristics of the proposed use that are not necessarily associated with Automobile Filling Station uses, or that are created by unusual site conditions, will be considered non-inherent effects. The inherent and non-inherent effects thus identified must then be analyzed, in the context of the subject property and the general neighborhood, to determine whether these effects are acceptable or would create adverse impacts sufficient to result in denial.

Technical Staff opined that the inherent adverse effects associated with automobile filling stations include (Exhibit 49, p. 14):

- (1) fuel pumps;
- (2) a structure providing storage space and shelter for employees;
- (3) traffic generated by customers, employees, and fuel delivery trucks;
- (4) potential for queuing vehicles on site;
- (5) noise associated with the use;
- (6) signage advertising gas products and prices;
- (7) outdoor lighting;
- (8) longer hours of operation than the average business establishment;
- (9) environmental impacts that may include fumes from idling vehicles and potential spillage of automobile fluids; and
- (10) underground fuel storage tanks.

The Hearing Examiner agrees that these characteristics are inherent in the use. Technical Staff indicated, based on analysis of previous gas station cases, that the only non-inherent characteristics of the proposed use are the convenience store and car wash; however, Staff noted

that “these affiliated uses have become common features of the modern-day filling station.”

Exhibit 49, p.15. Technical Staff found that the non-inherent characteristics it identified did not warrant denial of the petition, given the station’s design and the conditions under which it will operate.

The Hearing Examiner agrees that conditions can be imposed which will reasonably moderate the non-inherent characteristics of the proposed use, but he finds that there is one other non-inherent characteristic of the subject site not mentioned by Technical Staff in its report – the fact that all of the station’s exiting traffic and a large part of its incoming traffic will utilize a street (Old Spencerville Road) that presently has no traffic flow, and that street is adjacent to the back yards of two existing residences (the Aladesuru and Singh homes).<sup>26</sup>

As noted by staff, limited hours, substantial landscape screening and architectural features designed to make this station compatible with its rural/residential setting can and should be imposed to limit the use’s adverse impacts on the neighbors; however, the Hearing Examiner fears that the additional non-inherent characteristic of heavy traffic on Old Spencerville Road will render those measures inadequate unless the impact of the new traffic is reduced by providing a screening fence and vegetation on the neighbors’ property on the east side of Old Spencerville Road.<sup>27</sup> As discussed in Part II. E. of this report, the Hearing Examiner has recommended an additional condition that would require Petitioner to submit a revised landscape plan showing the fence and landscaping to be installed on the Aladesuru and Singh properties, with their permission. Petitioner’s revised landscaping plan (Exhibit 80(b)) shows some landscaping to be added to the neighbors’ property, with their permission, but not a wooden fence that would serve as a better sound and light barrier.

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<sup>26</sup> Another property, listed as being owned by “Sunny Varkey” is also adjacent to Old Spencerville Road, but Mr. Varkey did not express any position in this case, and there is nothing in the record about him other than the location of his property.

<sup>27</sup> The Hearing Examiner had considered recommending elimination of the car wash, a reduction in the size of the convenience store, reduction in the number of gas pumps, or some combination of these steps, but has been persuaded by post-hearing submissions that such steps would be either unwarranted or ineffectual.

Technical Staff indicates that “a board on board type fence with planting materials along its base” would not be offensive to the rural character of the neighborhood (Exhibit 91 and 91(a)).<sup>28</sup>

With this change in the plans, the Hearing Examiner finds, based on the evidence in this case, and considering size, scale, scope, light, noise, traffic and environment, that there are no non-inherent effects that require a denial of the petition.

### **B. General Conditions**

The general standards for a special exception are found in Section 59-G-1.21(a). The Technical Staff report, the exhibits and the testimony of the witnesses provide ample evidence that the general standards would be satisfied in this case.

#### **Sec. 59-G-1.21. General conditions.**

**§5-G-1.21(a)** *-A special exception may be granted when the Board or the Hearing Examiner finds from a preponderance of the evidence of record that the proposed use:*

*(1) Is a permissible special exception in the zone.*

Conclusion: An Automobile Filling Station use is a permissible special exception in the C-1 Zone, pursuant to Code § 59-C-4.2(e).

*(2) Complies with the standards and requirements set forth for the use in Division 59-G-2. The fact that a proposed use complies with all specific standards and requirements to grant a special exception does not create a presumption that the use is compatible with nearby properties and, in itself, is not sufficient to require a special exception to be granted.*

Conclusion: The proposed use complies with the specific standards set forth in § 59-G-2.06 for an Automobile Filling Station use as outlined in Part C, below.

*(3) Will be consistent with the general plan for the physical development of the District, including any master plan adopted by the Commission. Any decision to grant or deny*

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<sup>28</sup> Technical Staff would prefer just landscaping and opined that a masonry wall would not be compatible with the area (Exhibit 91(a)); however, the Hearing Examiner finds that the increase from zero trips a day on Old Spencerville Road to 1,528 trips per day, at a minimum (Exhibit 91(b)), cannot be adequately screened by vegetation alone.

*special exception must be consistent with any recommendation in a master plan regarding the appropriateness of a special exception at a particular location. If the Planning Board or the Board's technical staff in its report on a special exception concludes that granting a particular special exception at a particular location would be inconsistent with the land use objectives of the applicable master plan, a decision to grant the special exception must include specific findings as to master plan consistency.*

Conclusion: The property is located within the area covered by the Cloverly Master Plan, approved and adopted in 1997. The Cloverly Master Plan divides the planning area into three sections, a "Residential Wedge," bordered on the north by an "Agricultural Wedge" and on the south by "Suburban Communities." The subject property lies just inside the Residential Wedge, quite close to the Agricultural Wedge.

The Master Plan directly addresses the subject site (pages 20 & 21):

*Rezone two properties bordered by Old Spencerville Road, New Hampshire Avenue and Spencerville Road Relocated from RE-1 to C-1 . . . [i.e., the subject site]. Development of the entire C-1 zoned area at this location should be accomplished with the following design guidelines:*

- (1) Commercial buildings should be located in a manner [that] maintains the rural character of New Hampshire Avenue with building setbacks comparable to adjacent properties.*
- (2) Driveway entrances shall be minimized in width to maintain a safe and clearly defined edge of pavement along New Hampshire Avenue.*
- (3) All proposed landscaping shall enhance and reinforce the rural character of New Hampshire Avenue and Spencerville Road. This shall be accomplished by screening all parking and internal vehicular circulation from the roadway with a low, evergreen hedge. A significant number of deciduous shade trees should be planted around the perimeter of the site to create a natural woodland setting.*
- (4) If a gas station is the proposed use for the site, the configuration of the building and canopy should be sited so as to minimize visual impacts from New Hampshire Avenue and Spencerville Road in order to reinforce the rural character of the area.*
- (5) Night lighting shall be located predominantly under the canopy to avoid glare and excessive lighting [that] is incompatible with the rural setting.*



The Cloverly Master Plan also contains general recommendations for evaluating special exception applications (page 37), which suggest maintenance of a residential appearance, where feasible, and insuring compatibility with the scale and architecture of the adjoining neighborhood, consistent with the proposed use.

Technical Staff concluded that the proposed use, as modified, is consistent with the Cloverly Master Plan. Exhibit 49, p. 11. With additional modifications, as discussed in Part II. G. of this report, the Hearing Examiner agrees.

- (4) *Will be in harmony with the general character of the neighborhood considering population density, design, scale and bulk of any proposed new structures, intensity and character of activity, traffic and parking conditions, and number of similar uses. The Board or Hearing Examiner must consider whether the public facilities and services will be adequate to serve the proposed development under the Growth Policy standards in effect when the special exception application was submitted.*

Conclusion: With the modifications discussed elsewhere in this report, the Hearing Examiner agrees with Technical Staff's conclusion that the use will be in harmony with the general character of the neighborhood. As stated by Staff (Exhibit 49, p. 17):

The filling station has been architecturally designed to blend in with its more rural neighbors, the scale and bulk of the structures would be buffered by the applicant's proposed landscaping, and no similar uses are present in the neighborhood as defined by Staff.

As demonstrated in Part II. E. of this report, the public facilities are adequate to serve the proposed use.

- (5) *Will not be detrimental to the use, peaceful enjoyment, economic value or development of surrounding properties or the general neighborhood at the subject site, irrespective of any adverse effects the use might have if established elsewhere in the zone.*

Conclusion: The Hearing Examiner concludes that the proposed use, as modified, will not be

detrimental to the peaceful enjoyment, economic value or development of surrounding properties at the site. Despite Mr. Aladesuru's assertions to the contrary (Exhibit 85), there is no competent evidence that replacing an abandoned gas station with a functioning one on this site will reduce the economic value of surrounding properties. As noted above, the proposed use is located in a commercial zone, and most of its adverse impacts can be avoided by proper design of the station, limited hours of operation and effective screening. The only remaining significant physical impact it will have on the nearest residences is the production of traffic on Old Spencerville Road, which can be addressed by erection of a fence on the neighbors' property, which they have requested. Their concerns have been addressed through conditions recommended in Part V of this report. On the positive end, the proposed gas station will help ensure an adequate supply of automobile fuel to the area.

- (6) *Will cause no objectionable noise, vibrations, fumes, odors, dust, illumination, glare, or physical activity at the subject site, irrespective of any adverse effects the use might have if established elsewhere in the zone.*

Conclusion: Technical Staff concluded that the use will not cause any objectionable noise, vibrations, fumes, odors, dust, illumination, glare or physical activity at the subject site, and with the recommended modifications, the Hearing Examiner agrees. Some degree of "noise, vibrations, fumes, odors, dust, illumination, glare [and] physical activity" are inherent in a filling station use. To the extent that any of the cited effects are noticeable, they are inherent to the use. The lighting fixtures which will be used, the environmental protections built into the use, the limits on hours of operation, the landscape screening and the design of the station will reduce the listed adverse effects to within the inherent characteristics of this type of use. Thus, the special exception would be compliant with this provision.

- (7) *Will not, when evaluated in conjunction with existing and approved special exceptions in any neighboring one-family residential area, increase the number, intensity, or scope of special exception uses sufficiently to affect the area adversely or alter the predominantly residential nature of the area. Special exception uses that are consistent with the recommendations of a master or sector plan do not alter the nature of an area.*

Conclusion: Technical Staff reports that there is only one existing special exception within the defined neighborhood, and it is a horse-riding academy. Hence the proposed use will not increase the number, intensity, or scope of special exception uses sufficiently to affect the area adversely. Moreover, the filling station proposal is consistent with the Cloverly Master Plan. Therefore, by definition, the use will not alter the nature of the area.

- (8) *Will not adversely affect the health, safety, security, morals or general welfare of residents, visitors or workers in the area at the subject site, irrespective of any adverse effects the use might have if established elsewhere in the zone.*

Conclusion: The evidence supports the conclusion that the proposed use will not be a danger to public health or safety, as discussed in Part II. E. of this report. The nature of the use makes the morals issue inapplicable. As to security, Mr. Aladesuru expressed concerns that the proposed use would attract some “bad” people to the area. Exhibit 85. There is no probative evidence that such an effect would occur. In fact, having a lighted, modern gas station, instead of an old abandoned one, might well reduce any security risks in the area. Thus, the Hearing Examiner finds that the proposed use, as modified, would not adversely affect the health, safety, security, morals or general welfare of residents, visitors or workers in the area at the subject site.

- (9) *Will be served by adequate public services and facilities including schools, police and fire protection, water, sanitary sewer, public roads, storm drainage and other public facilities.*

Conclusion: The evidence supports the conclusion that the proposed special exception would be adequately served by the specified public services and facilities. The site has both public water and sewer access, and WSSC indicates Petitioner can make the connection. Tr. 134. Petitioner's landscape architect, Gerald Eastridge, testified that DPS had approved a stormwater concept plan. Tr. 133 and Exhibit 49, Attachment 10. By its nature, the use does not burden public schools. Police and fire protection are presumed adequate by the Growth Policy unless those agencies specify otherwise, which they have not.

- (A) *If the special exception use requires approval of a preliminary plan of subdivision, the Planning Board must determine the adequacy of public facilities in its subdivision review. In that case, approval of a preliminary plan of subdivision must be a condition of the special exception.*
- (B) *If the special exception does not require approval of a preliminary plan of subdivision, by the Board of Appeals must determine the adequacy of public facilities when it considers the special exception application. The Board must consider whether the available public facilities and services will be adequate to serve the proposed development under the Growth Policy standards in effect when the special exception application was submitted.*

Conclusion: The special exception sought in this case would require approval of a preliminary plan of subdivision. Therefore, the public facilities review of the Local Area Transportation Review ("LATR") will be done by the Planning Board at subdivision, and approval of the Preliminary Plan will be a condition of this special exception. Nevertheless, Petitioner's traffic engineer, Nancy Randall did do a traffic analysis (Exhibits 23(a) and 43), and found that the Local Area Transportation Review (LATR) would be met, as discussed in Part II. E. of this report. Technical Staff

agreed, and the matter will be reviewed at Subdivision. Exhibit 49, Attachment 6, p. 35. Policy Area Mobility Review (PAMR) does not apply to the special exception directly because its application was filed prior to the adoption of the new Growth Policy. It will apply at subdivision. The Hearing Examiner finds that Petitioner has made a sufficient showing that public facilities will be adequate at this stage.

(C) *With regard to public roads, the Board or the Hearing Examiner must further find that the proposed development will not reduce the safety of vehicular or pedestrian traffic.*

Conclusion: Petitioner's traffic engineer, Nancy Randall, testified that the proposed development will not reduce the safety of vehicular or pedestrian traffic. Tr. 109-110. There is no evidence to the contrary, and the Hearing Examiner therefore concludes that the proposed use would have no detrimental effect on the safety of vehicular or pedestrian traffic.

### **C. Specific Standards**

The testimony and the exhibits of record, including the Technical Staff reports, provide sufficient evidence that the specific standards required by Section 59-G-2.06 are satisfied in this case, as described below.

#### ***Sec. 59-G-2.06. Automobile filling stations.***

- (a) *An automobile filling station may be permitted, upon a finding, in addition to findings required in division 59-G-1, that:*
- (1) *The use will not constitute a nuisance because of noise, fumes, odors or physical activity in the location proposed.*

Conclusion: For all the reasons set forth in Part IV. B. of this Report in response to General Condition §5-G-1.21(a)(6), the Hearing Examiner concludes, as did Technical Staff,

that the use will not cause any objectionable noise, fumes, odors or physical activity at the subject site.

*(2) The use at the proposed location will not create a traffic hazard or traffic nuisance because of its location in relation to similar uses, necessity of turning movements in relation to its access to public roads or intersections, or its location in relation to other buildings or proposed buildings on or near the site and the traffic pattern from such buildings, or by reason of its location near a vehicular or pedestrian entrance or crossing to a public or private school, park, playground or hospital, or other public use or place of public assembly.*

Conclusion: For all the reasons set forth in Part II. E. of this report with regard to Traffic and Part IV. B. of this Report in response to General Condition §5-G-1.21(a)(9), the Hearing Examiner concludes, as did Technical Staff, that the use, as modified, will not create a traffic hazard or a traffic nuisance for any of the stated reasons. Although the Hearing Examiner had serious concerns about the traffic levels that would be produced on Old Spencerville Road, the modifications to the site plan agreed to by Petitioner, plus the condition recommended by the Hearing Examiner for a six foot, board-on-board fence will alleviate those concerns sufficiently to avoid creating a nuisance.

*(3) The use at the proposed location will not adversely affect nor retard the logical development of the general neighborhood or of the industrial or commercial zone in which the station is proposed, considering service required, population, character, density and number of similar uses.*

Conclusion: As stated by Technical Staff (Exhibit 49, p. 20):

The proposed filling station will be consistent with the Cloverly Master Plan recommendations for the site. Therefore, the proposed station will not [adversely] affect the logical development of the neighborhood . . .

The needs analysis done in this case also demonstrates that the proposed use will support logical development in the zone by fulfilling a demonstrable need. *See Part II. F. of this report.*

(b) *In addition, the following requirements must be complied with:*

*(1) When such use abuts a residential zone or institutional premises not recommended for reclassification to commercial or industrial zone on an adopted master plan and is not effectively screened by a natural terrain feature, the use shall be screened by a solid wall or a substantial, sightly, solid fence, not less than 5 feet in height, together with a 3-foot planting strip on the outside of such wall or fence, planted in shrubs and evergreens. Location, maintenance, vehicle sight distance provisions and advertising pertaining to screening shall be as provided for in article 59-E. Screening shall not be required on street frontage.*

Conclusion: The use will abut a residential Zone, but the only part of the site which does not abut street frontages is the property's southeast property line, which is an undeveloped lot owned by Montgomery County. Technical Staff notes that, given Petitioner's landscaping plan, "the filling station would be effectively screened from the abutting residential zone by generous plantings, trees, and shrubs." Exhibit 49, p. 21. Although technically not required by this provision, additional landscaping and a fence will be added to fully screen confronting properties on Old Spencerville Road.

*(2) Product displays, parked vehicles and other obstructions which adversely affect visibility at intersections or to station driveways are prohibited.*

Conclusion: Technical Staff found that there will be no product displays, parked vehicles or other obstructions to adversely affect site access. Exhibit 49, p. 21. The Hearing Examiner agrees.

*(3) Lighting is not to reflect or cause glare into any residential zone.*

Conclusion: The lighting is designed to shield light and glare and direct it to prevent spillover.

When the station is completely closed, there will be some lighting under the canopy for safety and a few of the bollard lights around the property, but the main area lights will be turned off. The revised Lighting and Photometric Plan (Exhibit 68(e)), shows that light spillage does not exceed 0.1 footcandles at the side and rear property lines. There will also be a significant amount of landscaping to screen the site. The Hearing Examiner concludes, as did Technical Staff (Exhibit 49, p. 21), that the use will not cause any light spillage or glare into any residential zone.

*(4) When such use occupies a corner lot, the ingress or egress driveways shall be located at least 20 feet from the intersection of the front and side street lines of the lot as defined in section 59-A-2.1, and such driveways shall not exceed 30 feet in width; provided, that in areas where no master plan of highways has been adopted, the street line shall be considered to be at least 40 feet from the center line of any abutting street or highway.*

Conclusion: According to Technical Staff, the proposed layout satisfies this standard (Exhibit 49, p. 22), and the Hearing Examiner so finds:

All ingress and egress driveways to the site are at least 20 feet from the intersections of New Hampshire/Old Spencerville and New Hampshire/Spencerville (MD 198). The proper width of the ingress/egress driveways must be determined by the appropriate authority prior to the issuance of building permits.

*(5) Gasoline pumps or other service appliances shall be located on the lot at least 10 feet behind the building line; and all service storage or similar activities in connection with such use shall be conducted entirely within the building. There shall be at least 20 feet between driveways on each street, and all driveways shall be perpendicular to the curb or street line.*

Conclusion: Technical Staff reports that the gasoline pumps and vacuum area are both located at least 10 feet behind the building line. Exhibit 49, p. 22. The storage activities



associated with the use will be conducted inside the convenience store building.

There is over 20 feet between the various driveways, but the southeastern driveway onto Old Spencerville Road is not perpendicular to the curb or street line. Petitioner modified it this way to reduce headlight glare into the confronting properties. When the Hearing Examiner pointed out the “perpendicular” language to the parties and Technical Staff (Exhibit 87), Technical Staff recommended that the driveway be restored to its original configuration, the current one being “less perpendicular.” Exhibit 91, p. 2.

The Hearing Examiner does not believe that there are degrees of perpendicular. Perpendicular means that two lines intersect at a 90 degree angle. Technical Staff suggested, alternatively, that the Hearing Examiner should consider taking a “purposivist approach” to interpreting the Zoning Ordinance. Exhibit 91, p. 2. Petitioner takes that approach, noting that the purpose of this provision was to improve the safety of the driveways for those turning into a trafficked road, and Old Spencerville Road will have no traffic beyond the driveway in question because it dead-ends shortly thereafter. Petitioner buttresses its argument by citing to a number of cases where the Board approved non-perpendicular driveways for gas stations (Exhibit 90, pp. 7-8).<sup>29</sup> Petitioner concludes (Exhibit 90, p. 8):

In summary, more because Section 59-G-2.06(b)(5) is not applicable in an instance where the intersecting public street carries no through traffic, but also because the Board of Appeals has seen fit to relax this standard of subsection (b)(6) when warranted by traffic operations, circulation issues or other good causes, the driveway alignment proposed by ExxonMobil is consistent with the purpose and intent of Section 59-G-2.06(b)(5) of the Zoning Ordinance.

The Hearing Examiner appreciates the common sense of these arguments,

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<sup>29</sup> Case No. S-657B, Petition of Sunoco, Inc., 10625 Connecticut Avenue, Kensington; Case No. S-382-D, Petition of BP Amoco, 13800 Georgia Avenue, Aspen Hill; and Case No. S-1825, Petition of Exxon Company, USA, 19815 Frederick Road, Germantown.

but does not feel free to ignore the unambiguous language of the statute. The applicable rule of statutory construction was set forth by the Maryland Court of Appeals in *Trembow v. Schonfeld*, 393 Md. 327, 336-337, 901 A.2d 825, 831 (2006),

Our goal is to ascertain and implement the legislative intent, and, if that intent is clear from the language of the statute, giving that language its plain and ordinary meaning, we need go no further. We do not stretch the language used by the Legislature in order to create an ambiguity where none would otherwise exist. If there is some ambiguity in the language of the statute, either inherently or in a particular application, we may then resort to other indicia to determine the likely legislative intent. [Citations omitted.]

The problem is that the word “perpendicular” is not ambiguous either inherently or in its application to the driveway in question.<sup>30</sup> Thus, the Hearing Examiner feels it must be given its plain meaning in this case.<sup>31</sup> A condition has been recommended requiring Petitioner to revise the driveway in question to make it perpendicular again prior to subdivision. This outcome will not result in headlight glare into the confronting properties, if the Board also adopts the Hearing Examiner’s recommended condition that Petitioner erect a fence on the property of the confronting neighbors, with their permission.

*(6) Light automobile repair work may be done at an automobile filling station; provided, that no major repairs, spray paint operation or body or fender repair is permitted.*

Conclusion: The Petitioner is not proposing any repair work relative to the proposed use.

*(7) Vehicles shall not be parked so as to overhang the public right-of-way.*

Conclusion: No parking areas are located in a way that would permit overhang of vehicles onto the public right-of-way.

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<sup>30</sup> It is ambiguous as applied to the Spencerville Road driveway on the south, because that is not a driveway in the normal sense, but rather a right-in only access to the station, whereas the Old Spencerville Road driveways are normal, two-way driveways.

<sup>31</sup> It would seem sensible to remove this requirement by a zoning text amendment and leave the safety design to traffic safety engineers; however, at the present time, “perpendicular” is still a statutory requirement.

*(8) In a C-1 zone, an automobile, light truck and light trailer rental, as defined in section 59-G-2.07, and in a C-2 zone, an automobile, truck and trailer rental lot, as defined in section 59-G-2.09, may be permitted as a part of the special exception, subject to the provisions set forth for such uses in this section. In addition, a car wash with up to 2 bays may be allowed as an accessory use as part of the special exception.*

Conclusion: Petitioner does not seek to rent automobiles, trucks or trailers on this site. A single-bay car wash is proposed, as is permitted by this section.

#### **D. Additional Applicable Standards**

##### **59-G § 1.23. General development standards**

- (a) **Development Standards.** *Special exceptions are subject to the development standards of the applicable zone where the special exception is located, except when the standard is specified in Section G-1.23 or in Section G-2.*

Conclusion: The following chart from the Technical Staff Report (Exhibit 49, p. 13), demonstrates compliance with all applicable development standards:

<i>Development Standard</i>	<i>Required</i>	<i>Provided</i>	<i>Applicable Zoning Provision</i>
<i>Maximum Lot Area</i>	<i>15 Acres</i>	<i>1.25 Acres</i>	<i>§ 59-C-4.341</i>
<i>Building Height</i>	<i>30'</i>	<i>26'</i>	<i>§ 59-C-4.342</i>
<i>Building Setback from R.O.W. (New Hampshire Ave)</i>	<i>10'</i>	<i>25</i>	<i>§ 59-C-4.343(a)(1)</i>
<i>Building Setback from R.O.W. (Old Spencerville Road)</i>	<i>60' from Center Line of Street to all Buildings</i>	<i>60'</i>	<i>§ 59-C-4.343(a)(3)</i>
<i>Rear Yard Setback from RE-1 Property to the Southeast</i>	<i>35'</i>	<i>39'</i>	<i>§ 59-C-1.323(b)(2)</i>
<i>Minimum Green Area Provided</i>	<i>10% of Lot</i>	<i>40% of Lot (21,779 s.f. feet of green space to the 54,449 total s.f.)</i>	<i>§ 59-C-4.344</i>
<i>Parking Setback</i>	<i>35'</i>	<i>35'</i>	<i>§ 59-E-2.81(a)</i>
<i>Parking Spaces (Revised after the hearing)</i>	<i>15'</i>	<i>16'</i>	<i>§ 59-E-3.7</i>

- (b) ***Parking requirements.*** *Special exceptions are subject to all relevant requirements of Article 59-E.*

Conclusion: Zoning Ordinance §59-E-3.7 provides that an automobile filling station must provide two parking spaces for each car wash bay and one parking space for each employee. Since there will be one car wash bay and 4 employees, this part of the use will require 6 parking spaces. The same provision indicates that a general retail operation must provide 5 parking spaces for each 1,000 gross leasable square feet. In this case, only 1,770 square feet of the service building will be devoted to the convenience store,<sup>32</sup> and thus the convenience store operation would require 9 parking spaces (5 X 1.77). The total number of required spaces this site would be 15 spaces. Petitioner will provide 14 spaces at the store and 2 near the car vacuums, totaling 16 parking spaces.<sup>33</sup> The 16 spaces that are planned for the site meet the statutory criteria.

- (c) ***Minimum frontage.*** *In the following special exceptions the Board may waive the requirement for a minimum frontage at the street line if the Board finds that the facilities for ingress and egress of vehicular traffic are adequate to meet the requirements of section 59-G-1.21:*
- (1) *Rifle, pistol and skeet-shooting range, outdoor.*
  - (2) *Sand, gravel or clay pits, rock or stone quarries.*
  - (3) *Sawmill.*
  - (4) *Cemetery, animal.*
  - (5) *Automobile Filling Stations and Automobile Filling Stations, including radio and T.V. broadcasting stations and telecommunication facilities.*
  - (6) *Riding stables.*
  - (7) *Helipoint and helistop.*

Conclusion: There are no applicable frontage requirements in the C-1 Zone.

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<sup>32</sup> Technical Staff originally indicated that 22 spaces were required based on a calculation of 3,250 square feet of retail space in the convenience store. In fact, there will be only 1,770 square feet of leasable space for the convenience store operation, so the number of spaces required is correspondingly reduced.

<sup>33</sup> Petitioner initially counted 10 spots adjacent to the gas pumps as parking spaces (in addition to the 16 spaces located elsewhere on the site), and therefore indicated that 26 parking spaces would be provided. The Hearing Examiner does not include the gas pump locations as parking spaces.

- (d) **Forest conservation.** *If a special exception is subject to Chapter 22A, the Board must consider the preliminary forest conservation plan required by that Chapter when approving the special exception application and must not approve a special exception that conflicts with the preliminary forest conservation plan.*

Conclusion: The subject property is not within a special protection area, and a Natural Resource Inventory/Forest Stand Delineation was reviewed and approved by the Technical Staff.

Exhibit 13. Staff also found that Petitioner qualified for an exemption from the requirements of the Forest Conservation Law. Exhibit 7.

- (e) **Water quality plan.** *If a special exception, approved by the Board, is inconsistent with an approved preliminary water quality plan, the applicant, before engaging in any land disturbance activities, must submit and secure approval of a revised water quality plan that the Planning Board and department find is consistent with the approved special exception. Any revised water quality plan must be filed as part of an application for the next development authorization review to be considered by the Planning Board, unless the Planning Department and the department find that the required revisions can be evaluated as part of the final water quality plan review.*

Conclusion: The site is not within a Special Protection Area, so a water quality plan is not required. DPS had approved a stormwater management concept plan for the site.

Exhibit 49, Attachment 10.

- (f) **Signs.** *The display of a sign must comply with Article 59-F.*

Conclusion: Permits will have to be obtained for the proposed signs, and copies thereof will be filed with the Board of Appeals Prior to posting the signs.

- (g) **Building compatibility in residential zones.** *Any structure that is constructed, reconstructed or altered under a special exception in a residential zone must be well related to the surrounding area in its siting, landscaping, scale, bulk, height, materials, and textures, and must have a residential appearance where appropriate. Large building elevations must be divided into distinct planes by wall offsets or architectural articulation to achieve compatible scale and massing.*

Conclusion: Not applicable. The site is in a commercial zone.

(h) ***Lighting in residential zones.*** All outdoor lighting must be located, shielded, landscaped, or otherwise buffered so that no direct light intrudes into an adjacent residential property. The following lighting standards must be met unless the Board requires different standards for a recreational facility or to improve public safety:

(1) *Luminaires must incorporate a glare and spill light control device to minimize glare and light trespass.*

(2) *Lighting levels along the side and rear lot lines must not exceed 0.1 foot candles.*

Conclusion: According to Technical Staff, no direct light will intrude into adjacent residential properties. Lighting levels will also not exceed the maximums specified at the side and rear property lines. Exhibit 68(e).

**59-G-1.24. Neighborhood need.**

*In addition to the findings and requirements of Article 59-G, the following special exceptions may only be granted when the Board, the Hearing Examiner, or the District Council, as the case may be, finds from a preponderance of the evidence of record that a need exists for the proposed use to serve the population in the general neighborhood, considering the present availability of identical or similar uses to that neighborhood:*

- (1) *Automobile filling station.*
- (2) *Automobile and light trailer rental lot, outdoor.*
- (3) *Automobile, truck and trailer rental lot, outdoor.*
- (4) *Automobile sales and service center.*
- (5) *Swimming pool, community.*
- (6) *Swimming pool, commercial.*

Conclusion: An Automobile filling Station is one of the special exceptions listed in Zoning Code §59-G-1.24 that requires a determination of neighborhood need. That need was amply demonstrated in a “needs analysis” done by Petitioner’s expert and approved by Technical Staff. This needs analysis is discussed at some length in Part II. F. of this Report. Based on the data discussed in that section, the Hearing Examiner finds,

from a preponderance of the evidence of record, that a need exists for the proposed use to serve the population in the general neighborhood, considering the present availability of identical or similar uses to that neighborhood.

Based on the testimony and evidence of record, I conclude that the Automobile Filling Station use proposed by Petitioner, as conditioned below, meets the specific and general requirements for the special exception, and that the Petition should be granted, subject to the conditions set forth in Part V of this report.

## **V. RECOMMENDATION**

Based on the foregoing analysis, I recommend that Petition No. S-2699, seeking a special exception allow an Automobile Filling Station with an accessory car wash and convenience store at 16201 New Hampshire Avenue, Silver Spring, Maryland, be GRANTED, with the following conditions:

1. The Petitioner shall be bound by all of its testimony and exhibits of record, and by the testimony of its witnesses and representations of counsel identified in this report.
2. The use is limited to an automobile filling station with ten (10) pumping stations, a convenience store (with 1,770 square feet of sales area), and a single-bay car wash, with no more than seven (7) employees, and a maximum of four (4) on any shift.
3. Hours of operation of the automobile filling station and the convenience store are limited to 5:00 a.m. to 12:00 midnight and that of the car wash to 8:00 a.m. to 9:00 p.m.
4. At the time of subdivision, Petitioner must confirm the center line established on the special exception site plan for Old Spencerville Road, in coordination with M-NCPPC Transportation Planning staff, DPWT staff, and State Highway Administration (SHA) staff.
5. At the time of subdivision, in coordination with Transportation Planning staff, DPWT staff, and

- SHA staff, Petitioner must determine the appropriate right-of-way and cross-section for Old Spencerville Road, and must dedicate from the established right-of-way center line a minimum of at least half the road right-of-way as public right-of-way for the entire property frontage.
6. At the time of subdivision, consistent with the 1997 Approved and Adopted *Cloverly Master Plan*, Petitioner must show right-of-way dedication for MD 650 (a minimum of 60 feet from the road right-of-way center line) and MD 198 (a minimum of 60 feet from the road right-of-way center line) on the preliminary plan.
  7. At the time of subdivision, in coordination with Transportation Planning staff, DPWT staff, and SHA staff, Petitioner must determine the appropriate design for the intersection of MD 650 and Old Spencerville Road, and must show necessary turn lanes into/out of Old Spencerville Road from/to MD 650 and potential northbound U-turn restrictions along MD 650 between MD 198 and Bay Hill Lane. The intersection improvements and other approved turning restrictions must be in place prior to the release of occupancy permits for the proposed special exception use.
  8. Petitioner must improve Old Spencerville Road along the property frontage to the cross-section determined as above within six months of the release of building permits for the proposed special exception use. Given the fact that there currently is no other land use proposed along Old Spencerville Road, the roadway may continue to be temporarily blocked to the east of the eastern driveway to the proposed use.
  9. Petitioner must remove the existing sidewalk along the property frontage and must provide a new five-foot wide sidewalk along MD 650 between MD 198 and Old Spencerville Road. The sidewalk must be offset two feet from the property boundary and must be in place prior to the release of occupancy permits for the proposed special exception use.
  10. The Petitioner must comply with stormwater and sediment control regulations of the Montgomery County Department of Permitting Services (DPS).



11. Fuel storage tank and fuel pump installation and use, must comply with the control guidelines and air quality permitting requirements of the Maryland Department of the Environment (MDE).
12. Fuel storage tanks must meet required technical standards and must comply with all county, state and federal permitting requirements.
13. Permits must be obtained for the proposed signs, and copies thereof must be filed with the Board of Appeals Prior to posting the signs.
14. Since the proposed use will require subdivision, in accordance with Zoning Ordinance §59-G-1.21(a)(9), approval of this special exception is conditioned upon approval of a preliminary plan of subdivision by the Planning Board. If changes to the site plan or other plans filed in this case are required at subdivision, Petitioner must file a copy of the revised site and related plans with the Board of Appeals.
15. Before this special exception takes effect, Petitioner must redraw its southeastern driveway onto Old Spencerville Road so that it will be perpendicular to the curb or street line in accordance with Zoning Ordinance §59-G-2.06(b)(5), as shown on earlier versions of the site plan. The revised site plan should be submitted to the Board of Appeals for final approval.
16. Before this special exception takes effect, Petitioner must modify its landscape plan to show a six-foot, board-on-board (or solid wood) fence, with plantings at its base and designed in a manner approved by Technical Staff, on the properties of the confronting property owners on Old Spencerville Road, whose addresses are 1127 Parrs Ridge Drive (currently Michael Aladesuru) and 1131 Parrs Ridge Drive (currently Bikram Singh). This condition will apply only if permission for such a fence and plantings is given by the property owners. Petitioner must also make reasonable efforts (*i.e.*, certified mail) to advise the other confronting property owner on Old Spencerville Road, Sunny Varkey, of the fence proposal, and offer to extend the fence onto his property, designed in a manner approved by Technical Staff. The revised

landscape plan should be submitted to the Board of Appeals for final approval.

17. Petitioner must obtain and satisfy the requirements of all licenses and permits, including but not limited to building permits and use and occupancy permits, necessary to occupy the special exception premises and operate the special exception as granted herein. Petitioner shall at all times ensure that the special exception use and premises comply with all applicable codes (including but not limited to building, life safety and handicapped accessibility requirements), regulations, directives and other governmental requirements.

Dated: June 30, 2008

Respectfully submitted,

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Martin L. Grossman  
Hearing Examiner